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N. 2853-D

No. 14072

United States
Court of Appeals
for the Ninth Circuit

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 11-13-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

HAROLD SHIRE,
208 S. Beverly Drive,
Beverly Hills, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney,

RAY H. KINNISON,
MANUEL REAL,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 22875CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN HENRY HACKER,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal Military Training and Service Act]

The grand jury charges:

Defendant John Henry Hacker, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 130, said board being then and there duly created and acting, under the Selective Service System established by said act, in San Bernardino County, California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class 1-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on January 14, 1953, in Los Angeles County, California, in the

Central Division of the Southern District of California; and on or about January 14, 1953, in Los Angeles County, California, in the division and district aforesaid, the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do.

/s/ WALTER S. BINNS,
United States Attorney.

A True Bill,

/s/ Indistinguishable,
Foreman.

ADM:AH

[Endorsed]: Filed May 20, 1953 [2*]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 1, 1953

Present: The Hon. Wm. M. Byrne,
District Judge.

Proceedings: For arraignment and plea.

Defendant is arraigned states his true name is John Henry Wilson and pleads not guilty as charged in the Indictment.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

It is ordered that this cause is set for trial July 28, 1953, 10 a.m. Jury waiver is filed.

EDMUND L. SMITH,
Clerk,

By /s/ EDW. F. DREW,
Deputy Clerk. [3]

[Title of District Court and Cause.]

WAIVER OF JURY

The above cause coming on regularly for trial, defendant being present with counsel, Harold Shire, Esq., and the defendant being desirous of having the case tried before the Court without jury, now requests of the Court that the case be so tried and hereby consents that the Court shall sit without a jury and hear and determine the charges against the defendant without a jury.

Dated: June 1, 1953.

/s/ JOHN HENRY HACKER,
Defendant in pro per.

I have advised the defendant fully as to his rights and assure the Court that his request for a trial without a jury is understandingly made.

/s/ HAROLD SHIRE,
Attorney for Defendant.

The United States Attorney consents that the request of the defendant be granted and that the trial proceed without a jury.

/s/ JAMES K. MITSUMORI,
Assistant U. S. Attorney.

Approved:

/s/ WM. M. BYRNE,
United States District Judge.

[Endorsed]: Filed June 1, 1953. [4]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JUNE 22, 1953

Present: The Hon. Wm M. Byrne,
District Judge.

Proceedings: For hearing ex parte motion for permission for defendant to leave this jurisdiction pending trial July 28, 1953.

It is ordered that said motion is granted, and it is further ordered that trial is reset for Aug. 4, 1953.

EDMUND L. SMITH,
Clerk,

By /s/ EDW. F. DREW,
Deputy Clerk. [5]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUG. 4, 1953

Present: The Hon. Peirson M. Hall,
District Judge.

Proceedings: For trial.

It is ordered that this cause is assigned to Judge Ling for trial.

EDMUND L. SMITH,
Clerk,

By /s/ S. W. STACEY,
Deputy Clerk. [6]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUG. 4, 1953

Present: The Hon. Dave Ling,
District Judge.

Proceedings: For Court trial.

Gov't Ex. 1, and 1-A, are received into evidence.

Gov't rests.

Def't John Henry Hacker is called, sworn, and testifies in his own behalf.

Deft's Ex. A is received into evidence.

Def't rests. No rebuttal is offered.

Filed defendant's motion for judgment of acquittal.

It is ordered that cause be submitted and continued to Aug. 17, 1953, 1:30 p.m., for ruling.

EDMUND L. SMITH,
Clerk,

By /s/ WM. A. WHITE,
Deputy Clerk. [7]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT OF ACQUITTAL

Comes Now the defendant, John Henry Hacker, by and through his counsel, and moves the court for a judgment of acquittal for each and every one of the following reasons:

1. There is no evidence to show that the defendant is guilty as charged in the indictment.

2. The Government has wholly failed to prove a violation of the act and regulations by the defendant as charged in the indictment.

3. The undisputed evidence shows that the defendant is not guilty.

4. The denial of the claim for exemption as a minister is without basis in fact, arbitrary, capricious and contrary to law.

5. The denial of the ministerial status is illegal, arbitrary and capricious because the draft board employed artificial standards in determining what constitutes a minister [8] of religion within the

meaning of the act and regulations, and did not follow the definition of the term used in the act and regulations in determining the claim of the defendant as a minister of religion.

6. The denial of the ministerial status by the draft board was arbitrary and capricious because it illegally held that the defendant's ordination was not proper; that his following was not a regular following; that his training was not proper.

7. The denial of the exemption for ministerial status by the draft board was arbitrary and capricious because they held the performance of secular work by the defendant alone, without determining whether it was his avocation. They used this in order to defeat him of his ministerial status when the undisputed evidence showed that he is not engaged in secular work as a main business but only incidental to his main work of the ministry, and that according to the act and regulations he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church, and is, in fact, the head of his congregation and the preacher for his congregation, and the evidence showed that the defendant pursued such preaching work as his vocation and did not preach incidentally to the performance of any secular work, and therefore the draft board order is illegal.

8. The undisputed evidence at the trial and the draft board records received into evidence show that there was a violation of procedural rights of the defendant before the local board on personal appearance because at the time he appeared before

the board they had their minds made up not to reconsider his case de novo but merely heard and listened to him with the intention of giving him the same classification so that he could appeal and thereby there was [9] no de novo classification by the local board upon personal appearance as though he had never been classified before, as required by Section 1624.2 of the regulations.

9. The undisputed evidence shows that upon the trial the draft board members were prejudiced and discriminated against the defendant because of his membership in a religious organization contrary to Section 1622.1 (d) of the regulations.

10. The local board deprived the defendant of procedural rights to a full and fair hearing before the board of appeals by failing to make an adequate and full written memorandum of the new additional oral evidence given by the defendant upon the occasion of his personal appearance, which new and additional oral evidence does not otherwise appear in the written papers sent to the board of appeals.

Respectfully submitted,

/s/ HAROLD SHIRE,
Attorney for Defendant.

[Endorsed]: Filed August 4, 1953. [10]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUG. 17, 1953

Present: The Hon. Dave W. Ling,
District Judge.

Proceedings: For ruling on motion for judgment of acquittal.

It Is Ordered that cause is continued to Aug. 26, 1953, 1:30 p.m., for said proceedings.

EDMUND L. SMITH,
Clerk,

By /s/ P. D. HOOSER,
Deputy Clerk. [11]

[Title of District Court and Cause.]

MINUTES OF THE COURT—AUG. 26, 1953

Present: The Hon. Dave W. Ling,
District Judge.

Proceedings: For ruling on motion for judgment of acquittal.

Court Orders said motion denied, and Finds defendant guilty as charged in Indictment.

Court Orders cause referred to Prob. Officer for investigation and report and continued to Sept. 8,

1953, 1:30 p.m., for sentence, and also for hearing motion for new trial.

EDMUND L. SMITH,
Clerk,

By /s/ P. D. HOOSER,
Deputy Clerk. [12]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The classification of the Selective Service Board, both local and on appeal, was arbitrary, capricious and illegal and there was no substantial basis upon which they could base the classification.

5. The denial of the ministerial status is illegal, arbitrary and capricious because the draft board employed artificial standards in determining what constitutes a minister of religion within the meaning of the act and regulations, and did not follow the

definition of the term used in the act and [13] regulations in determining the claim of the defendant as a minister of religion.

6. The denial of the ministerial status by the draft board was arbitrary and capricious because it illegally held that the defendant's ordination was not proper; that his following was not a regular following; that his training was not proper.

7. The denial of the exemption for ministerial status by the draft board was arbitrary and capricious because they held the performance of secular work by the defendant alone, without determining whether it was his avocation. They used this in order to defeat him of his ministerial status when the undisputed evidence showed that he is not engaged in secular work as a main business but only incidental to his main work of the ministry, and that according to the act and regulations he is regularly and customarily engaged in teaching and preaching the doctrines and principles of a recognized church, and is, in fact, the head of his congregation and the preacher for his congregation, and the evidence showed that the defendant pursued such preching work as his vocation and did not preach incidentally to the performance of any secular work, and therefore the draft board is illegal.

8. The undisputed evidence at the trial and the draft board records received into evidence show that there was a violation of procedural rights of the defendant before the local board on personal appearance because at the time he appeared before the

board they had their minds made up not to reconsider his case de novo but merely heard and listened to him with the intention of giving him the same classification so that he would appeal and thereby there was no de novo classification by the local board upon personal appearance as though he had never been classified before, as required by Section 1624.2 of the regulations. [14]

9. The undisputed evidence shows that upon the trial the draft board members were prejudiced and discriminated against the defendant because of his membership in a religious organization contrary to Section 1622.1 (d) of the regulations.

10. The local board deprived the defendant of procedural rights to a full and fair hearing before the board of appeals by failing to make an adequate and full written memorandum of the new additional oral evidence given by the defendant upon the occasion of his personal appearance, which new and additional oral evidence does not otherwise appear in the written papers sent to the board of appeals.

Dated: August 26, 1953.

/s/ HAROLD SHIRE,
Attorney for Defendant.

[Endorsed]: Filed August 26, 1953. [15]

[Title of District Court and Cause.]

MINUTES OF THE COURT—Sept. 8, 1953

Present: The Hon. Dave W. Ling,
District Judge;

Proceedings: For hearing motion for new trial, and
For hearing report of Prob. Officer and sentence.

Attorney Shire makes a statement in support of motion for new trial.

Court orders said motion denied.

Attorney Real makes a statement.

Attorney Shire makes statement in behalf of defendant.

Count Sentences defendant to two years' imprisonment for offense charged in Indictment, and grants stay of execution thereof until 5 p.m., Sept. 9, 1953.

Bail is exonerated.

EDMUND L. SMITH,
Clerk.

By /s/ MARY O. SMITH,
Deputy Clerk. [16]

United States District Court for the Southern District of California, Central Division

No. 22,875

UNITED STATES OF AMERICA,

vs.

JOHN HENRY WILSON, Charged as John Henry Hacker.

Criminal Indictment in one count for violation of U. S. C., Title 50, App., Sec. 462

JUDGMENT AND COMMITMENT

On this 8th day of September, 1953, came the attorney for the government and the defendant appeared in person and with counsel, Harold Shire.

It is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of having on or about January 14, 1953, in Los Angeles County, California, knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do, as charged in the Indictment; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the Indictment.

It is Adjudged that execution be stayed until 5 p.m., September 9, 1953, and that bail of the defendant is exonerated.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ DAVE W. LING,
United States District Judge.

[Endorsed]: Filed September 8, 1953. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of appellant: John Henry Hacker, 10806 Rose Avenue, Ontario, California.

Name and address of Appellant's attorney: Harold Shire, 208 So. Beverly Drive, Beverly Hills, Calif., Bradshaw 2-1854.

Offense: Violation, U. S. C. , Title 50, App., Section 462—Selective Service Act. 1948.

Defendant was found guilty on August 17, 1953, and was sentenced to a sentence of 2 years on Tuesday, September 8, 1953, by the Honorable David Ling:

Defendant is now on bail.

I, Harold Shire, appellant's attorney, hereby appeal to the United States Court of Appeals, Ninth Circuit, from the above stated judgment.

Dated: September 8, 1953.

/s/ HAROLD SHIRE,
Attorney for Appellant.

[Endorsed]. Filed September 8, 1953. [18]

In the United States District Court, Southern District of California, Central Division

No. 22875-Criminal

Honorable Dave W. Ling, Judge Presiding.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN HENRY HACKER (Also Known as JOHN HENRY WILSON),
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,
United States Attorney, By
MANUEL REAL,
Ass't United States Attorney.

For the Defendant:

HAROLD SHIRE, ESQ.

Tuesday, August 4, 1953, 10:45 A.M.

(Case called by the clerk.)

Mr. Real: Ready for the Government, your Honor.

Mr. Shire: Ready for the defendants in both cases, your Honor.

Mr. Real: In the Case of John Henry Hacker, No. 22875, I have a photostatic copy of the Selective Service file of John Henry Hacker, also known as John Henry Wilson, and ask it be marked as Government's Exhibit 1 for identification.

Pursuant to a stipulation between the Government and the defendant through his attorney:

"It is Hereby Stipulated and Agreed by and between the United States of America, Plaintiff, and John Henry Hacker, Defendant, in the above-entitled matter, through their respective counsel, as follows:

"That it be deemed that the Clerk of Local Board No. 130 was called, sworn and testified that:

"1. She is a clerk employed by the Selective

Service System of the United States Government.

"2. The defendant, John Henry Hacker, is a registrant of Local Board No. 130.

"3. As Clerk of Local Board No. 130, she is legal custodian of the original Selective Service file of John Henry Hacker. [2*]

"4. The Selective Service file of John Henry Hacker is a record kept in the normal course of business by Local Board No. 130, and it is the normal course of Local Board No. 130's business to keep such records.

"It is Further Stipulated that a photostatic copy of the original Selective Service file of John Henry Hacker, marked 'Government's Exhibit 1' for identification, may be introduced in evidence in lieu of the original Selective Service file of John Henry Hacker.

"Dated this 4th day of August, 1953."

Signed by myself on the part of the Government, by Mr. Shire as attorney for the defendant, and by the defendant himself, your Honor.

We ask it be marked as Government's Exhibit 1-A for identification. And, pursuant to stipulation, we move that Government's 1 and 1-A for identification be introduced into evidence at this time.

The Court: All right, they may be received.

Mr. Real: With that evidence the Government will rest its case, your Honor.

Mr. Shire: I should like to call Mr. Hacker to the stand briefly, your Honor.

The Court: Very well. [3]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Defendant's Case in Chief

JOHN HENRY HACKER

also known as John Henry Wilson, the defendant herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows.

The Clerk: Your full name, please.

The Witness: My full name is John Henry Wilson.

The Clerk: Your full name is John Henry Wilson?

The Witness: That is my true name.

The Clerk: Your true name.

The Witness: That is the legal name.

The Clerk: Thank you.

The Witness: Also known as John Henry Hacker.

Direct Examination

By Mr. Shire:

Q. And you are known as John Henry Hacker?

A. That is right.

Q. And when you filed with the Selective Service System you also put "aka Wilson," also known as Wilson, is that right? A. That is true.

Q. What is the reason that you use the name Hacker?

A. When I was quite young, about five years old, my mother was remarried to Mr. Hacker, Haskell W. Hacker, and he is my stepfather and I have used my stepfather's name. The [4] legal complete proceedings were not finished, shall I say,

(Testimony of John Henry Hacker.)
for adoption, and for that reason my legal name is Wilson.

Q. How old are you, Mr. Hacker?

A. 20 years old.

Q. You are a member of the Jehovah's Witnesses, is that correct?

A. I am a Jehovah's Witness.

Q. Well, that is a group, is it not?

A. That is a group of witnesses to the most high God, Jehovah.

Q. And the legal governing body is the Watchtower Bible & Tract Society, located in Brooklyn, New York, is that correct?

A. That is correct.

Q. Did you inform your board that you were what is known as "a pioneer"? A. I did.

Mr. Shire: I believe the record so reflects, your Honor.

Q. What is a pioneer?

A. A pioneer minister——

Mr. Real: Your Honor, I will object as irrelevant and immaterial to the issues of this case.

The Court: Well, it may be, but he may answer. Go ahead.

A. A pioneer minister is a full-time minister of Jehovah's Witnesses and devotes a minimum of 100 hours a month to full-time preaching in the territory assigned to him, under [5] the direction of our governing body, the Watchtower Bible & Tract Society.

(Testimony of John Henry Hacker.)

Q. (By Mr. Shire): Are you also the company servant of your congregation?

A. I am the congregation servant.

Q. You are the congregation servant?

A. That is true.

Q. What does the congregation servant do?

A. The congregation servant has oversight of the group of Jehovah's Witnesses that form the congregation in his locality. He is the overseer, or the superintendent, or the minister of that congregation.

Q. What do you call your churches?

A. Our churches are called Kingdom Halls.

Q. Do you have a Kingdom Hall for your congregation? A. We have a Kingdom Hall.

Q. Where is it located?

A. It is located at 229 Desert Avenue in Ontario.

Q. Have you had a Kingdom Hall from October or November 1952, to the present time?

A. We have.

Q. Have you been their company servant?

A. Since that time I have been the congregation servant.

Q. Have you been a pioneer? [6]

A. I have been a pioneer since November the 1st, 1950.

Q. Have you performed any certain services for the members of your congregation?

A. I have performed a funeral service for one member of our congregation who died, and that is recorded in my file in newspaper clippings.

Q. Is that a Spanish congregation?

A. That is a Spanish congregation.

(Testimony of John Henry Hacker.)

Q. Do you speak Spanish?

A. I speak Spanish fluently.

Q. How many members do you have in your congregation?

A. We have 31 Jehovah's Witnesses and approximately seven or eight persons of interest that attend our meetings.

Q. Do you conduct the service?

A. I conduct the meeting.

Q. In the commonly accepted sense of the word, as a minister are you the one who has the flock you administer to? A. That is right.

Mr. Real: Your Honor, I will object to the answer as a conclusion of the witness.

The Court: It may remain.

Mr. Shire: May I present these to the witness, your Honor?

Q. I will show you some documents and ask you if you know what they are?

A. These are invitations to public talks that we have [7] given, which have been delivered.

Mr. Real: We stipulate those may go in evidence, your Honor.

Mr. Shire: Thank you. May these be received in evidence? They show the name of Mr. Hacker as the company servant.

The Witness: Those are in Spanish.

Mr. Shire: As one exhibit.

The Clerk: It will be Defendant's Exhibit A in evidence.

Q. (By Mr. Shire): Do you have any outside work?

(Testimony of John Henry Hacker.)

A. At the present time I have no outside secular employment. I did, however, during the period.

Q. And you earned $640 in one year, is that right?

A. That is correct; in the year 1951, I earned $640.

Q. You drove a school bus? A. Part time.

Q. An hour to an hour and a half in the morning, five days a week only?

A. Five days a week only, and not during the summer.

Q. Not during the summer?

A. Not during the summer, I did not work.

Q. Did you have any other employment?

A. I had no other employment.

Mr. Shire: May I have Exhibit 1, if your Honor pleases? I should like permission to show a certain portion to the witness, if your Honor pleases. [8]

The Court: You may.

Q. (By Mr. Shire): At page 35, the minutes of the meeting of the Selective Service Board. Will you read this over, Mr. Hacker, please? This is page 35 of Exhibit 1, the minutes of the meeting of the Selective Service Board. Did you read it?

A. Yes.

Q. Are those minutes substantially correct?

A. No, they are not.

Q. Will you relate in what way those minutes are incorrect? What took place at the personal appearance?

A. A great deal of this information that is con-

(Testimony of John Henry Hacker.)

tained in here, shall I say, is difficult, and besides that——

Mr. Real: Your Honor, I move to strike his difficulty.

The Court: It may be stricken.

Mr. Shire: It may be stricken. It is not responsive.

Q. Will you relate what took place, please?

A. In my own words?

Q. Yes, sir.

A. I believe in the evidence I submitted to the board to substantiate my claim for the ministry, on page 1—that is page 18 in this document—there is an outline of the material I presented to them. And if the judge or they can compare the two and see how that the minutes of the board compares with the outline that I have presented to them. I submitted my claim for a minister's classification. I [9] made mention of the fact that I was devoting my full time as my vocation to the ministry work as a fulltime pioneer.

I also related that I was the presiding minister of the Chino congregation of Jehovah's Witnesses. And certain questions were asked to me by the board other than what is found in this outline on page 1 that I wish to submit the evidence.

Q. What did they ask you and what was your answer that does not appear there?

A. One question that was asked me that is not here was why did we not salute the flag? And why did we, as a group, refuse to perform military serv-

(Testimony of John Henry Hacker.)

ice for the Government? And also, was it not true that we sold our literature; that it was a commercial work?

I answered and said that I believed that such questions had no bearing on my case or the ministry. And that then, I believe Mr. Dickey or Hickey, I believe his name was, said: "Well, for his own information would you answer his question?" which I did. That is not found in those minutes of the board.

Q. In other words, they went into religious belief; they asked you what you believed on certain things and why?

A. That is right. And also, I notice here on this minute information is not included. For example, they did not put down the time of our meeting. I explained to them that we conduct regular meetings at the Kingdom Hall three times a week, and the time of these meetings are not found [10] in the minutes of this hearing.

Q. Anything else?

A. Well, I notice that they have used expressions here. For example, I would like to read this one paragraph. And when I saw this paragraph at the board I immediately made an objection.

Q. Just answer the question, please.

A. Oh.

Q. Anything else that is not included in the minutes that you know of that took place?

A. Offhand, no.

(Testimony of John Henry Hacker.)

Mr. Shire: All right. I have finished questioning the witness.

Cross-Examination

By Mr. Real:

Q. When did you assume your formal appointment of the head of the congregation?

A. The formal appointment as head of the congregation?

Q. Yes.

A. I believe that the records show that it was in February of 1952, as head of the congregation. Is that correct? Check the records there. On the first page there is a certificate. Is that the one, the appointment? It is this one right here. There is a certificate. That is the pioneer minister.

Q. Is that the certificate you are referring to? [11] A. That is right.

Q. That is the one that shows your appointment as the head of your congregation?

A. In other words, we are affirmed in the appointment. I was serving as head for a period of time before the appointment was affirmed.

Q. That is your initial appointment?

A. That is my initial appointment, is my pioneer assignment.

Q. That is at what date?

A. March 13, 1952.

Q. You were classified what date?

A. Classified as I-A on what date?

Q. Yes.

(Testimony of John Henry Hacker.)

A. The first time after my submission of the record?

Q. That is correct.

A. I will tell you in one minute. My first classification was—you know.

Q. Will you tell me, please?

A. Offhand, I can't tell you. I have to look in the file. It is listed here. My classification to I-A was mailed on February 28, 1952; so that was my first classification.

Q. Do you perform marriages, Mr. Hecker?

A. I have not performed marriages as of yet.

Q. Can you perform marriages? [12]

Mr. Shire: Well, now, just a moment. Do you mean under the laws of this state? There will be an objection to it as being ambiguous.

Mr. Real: I just asked him the question: can he perform a marriage?

Mr. Shire: I will object to that.

The Court: Well, a valid marriage.

The Witness: You asked me can I perform a marriage. Actually, marriage——

Mr. Shire: Just a moment, Mr. Hacker, just a moment.

The Court: Go ahead.

The Witness: Actually, marriages are not made by men. They are made between Almighty God and the pair that are to be united. And Christ has said, "What God has united together let no man sunder."." The legality of marriage is before Almighty God.

(Testimony of John Henry Hacker.)

Q. (By Mr. Real): Then you cannot perform a marriage?

A. If you mean officiate at a marriage, yes; under the laws of our society I can; under the laws of this state you have to be 21.

Q. Under the laws of this state you cannot perform a marriage, is that correct?

A. In this state I have found that I cannot.

Mr. Real: That is all, your Honor. [13]

Redirect Examination

By Mr. Shire:

Q. Mr. Hacker, how long have you been a Jehovah's Witness?

A. I have been a Jehovah's Witness since 1942.

Q. Are your parents Jehovah's Witnesses?

A. My parents are Jehovah's Witnesses.

Mr. Shire: That is all, your Honor.

Mr. Real: One more question.

Recross-Examination

By Mr. Real:

Q. Mr. Hacker, when did you become a minister? A. In what way?

Q. When did you become a minister?

A. I became a full-time minister of Jehovah's Witnesses on November 1st, 1950.

Q. I asked you when did you become a minister?

A. Do you mean when I made a dedication of my life?

Q. Yes.

(Testimony of John Henry Hacker.)

A. The dedication of my life as a minister was made very early to the ministry, much as Samuel and Matthew and many of the other examples in the Bible; and that was in September of 1942, the dedication and baptism, of my life for the ministry.

Q. How old were you then?

A. At that time I believe I was nine years old. The [14] dedication was made then.

Mr. Real: Nothing else, your Honor.

Mr. Shire: I have no further questions.

The Court: That will be all.

Mr. Shire: We rest. If your Honor pleases, there is no rebuttal?

Mr. Real: There is no rebuttal.

Mr. Shire: I should like to present to the court a written motion for judgment of acquittal and file it at this time.

The Court: You may.

Mr. Shire: I have three cases, if your Honor pleases—four cases—that have been decided. The Sixth Circuit case of United States v. Comodor and United States v. Niznik. That is 184 Fed. (2d) 972. And United States of America v. Walter Kobil. I do not have the citation of that Eastern District of Michigan, No. 32390, September 13, 1951; and the United States of America v. Stephen Knodis, United States District Court, District of New Hampshire, No. 6216. These are similar cases, if your Honor pleases.

And in this case we have a question. The records

reflect that the draft board even sent the Form 111 to the Watchtower Bible & Tract Society, notifying them that an employee of theirs as a minister was being taken.

If I may point this out to the court in the cover sheet? [15] On July 21, 1952, "Mailed 110 to Registrant." That is notice that he was in I-A. And 111 to T. J. Sullivan of Watchtower. And the record reflects that T. J. Sullivan is the superintendent of ministers and evangelists for the Watchtower Bible & Tract Society. He is the one who certifies that Mr. Hacker was a pioneer and a minister.

I recognize, your Honor, that within the structure of the law many of the boys who claim to be ministers certainly do not come within the Act itself, but from the Act itself—Mr. Real brought a copy down—this man is actually a full-time minister and head of a congregation. He has the physical properties of the church, has an actual congregation that he administers to. And I submit, your Honor, that this man comes directly within the law. There isn't any substantial basis for the draft board to have classified him other than as a minister. I cannot possibly see anything in the files.

The Court: What is your view, Mr. Real?

Mr. Real: Your Honor, I submit that the only question here is whether or not there actually was any arbitrary or capricious conduct on the part of the board; or whether there is any basis in fact in the file for the determination as to whether or not this particular defendant is a minister as he claims.

Now, certainly we realize that a claim for defer-

ment is a claim that must be substantiated by the claimant himself. [16] It is not something that is placed upon the board to establish, whether or not he is a minister.

I submit to your Honor, that up until the time of March 13, when the defendant had already been classified in I-A and was being processed at the time on his claim, that until that time he was not appointed. He was then appointed by this Society to so serve on March 13th as a visiting minister of the Chino, California, congregation.

I submit that even though we have a question as to whether or not the defendant was a minister at the time that the board met, that determination is a basis in fact on that as reflected in the minutes of the meeting.

Mr. Hickey asked him whether or not he could perform a marriage ceremony, which is one of the normal functions of a minister, and that he could not. The argument has been raised that the question is not a question as to whether or not a man is a minister under the laws of the state in which he lives or in which he is practicing his particular profession.

However, I submit that, let us assume an attorney from New York comes to California. He can say that he is an attorney, but certainly he cannot practice law in California without having passed the State Bar, and therefore, any functions that he may claim as a lawyer in California are worthless to him in this particular state. [17]

I think we have an analogous situation here. Here

is a man who claims to be a minister and yet he cannot perform the functions of a minister in this particular state because of his youth. I think that that is sufficient basis for the board to say you are or you are not a minister. In this case they said, "no," and therefore I think under the holding of the Cox case the only question is as to whether or not there was a basis in fact. The Government submits there was and therefore the defendant must be found guilty as charged.

The Court: Was that the sole basis?

Mr. Real: Assuming it was the sole basis, your Honor.

The Court: I say, does the record show that? I do not know.

Mr. Real: The record does not show that particular thing. They did not point that out as a basis of fact in pointing out a basis. I would say that that could be a basis in fact for the classification, no matter how that weighs in. It is not a question of weight. It is a question whether or not, even though there is minutely a basis, there is a basis in fact.

Mr. Shire: I should like to read from the Niznik and Comodor cases, 184 Fed. 2d 972. The court says there:

"Although the members of the draft board performed long, laborious, and patriotic duties, nevertheless, the ruling in this regard, that appellants were not entitled to classification as ministers [18] of religon, was based not upon the evidence or information in appellant's files, or upon a belief in the truthfulness of the statements made by appellants,

but upon the fact that they were members of Jehovah's Witnesses. The regulation pertaining to ministerial classification in this case was plain.

" '(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religon * * *

" '(b) A regular minister of religion is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.' Section 622.44 of the Selective Service Regulations."

The court goes on to say:

"Disregard of this provision, and refusal to classify as a minister of religion solely on the ground that appellants were members of a religious sect and that they had not attended a religious seminary and had been regularly ordained, was arbitrary and contrary to the law and regulations."

And then quoting from the regulations again, the court [19] says.

" 'In classifying a registrant there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization. Each registrant shall receive equal and fair justice.' Section 623.1(c) of the Selective Service Regulations.

"The classification of the Local Board, accordingly, was invalid, and its action void. The judg-

ments are, therefore, reversed, the convictions are set aside and appellants are discharged."

Your Honor, the argument of the Government in selecting one thing such as this—these boys register at the age of 18—to say that because of the California law, no one can perform a marriage ceremony until they are 21, that he is not a minister, is not within the Act. The Act does not say anything about that, and I submit that he comes clearly within the Act.

Not only does he come within the Act technically, I say that what we know as fair and honest men, that this man is a minister. He is not just one who says: Well, I belong to a certain group and all of us are ministers, and therefore I am a minister. But he actually has a congregation, and it is reflected by the members of the congregation who sign their [20] names as being members of the congregation.

And I say that he has been their minister for some years and it is reflected by the fact that they actually have a church where he regularly preaches, where his name is out in front, where they publish material saying that he is the minister.

It is actually reflected by the fact that he devotes his full time to that church and that congregation. And I submit, your Honor, that he comes absolutely within the meaning of what we know as a minister or a head of a church, and within the meaning of the Act certainly.

The Court: Are those cases to be found any place except in those advance slips?

Mr. Shire: Well, I just have these, your Honor. I presume they are in the books.

The Court: You have the memorandum, I believe.

Mr. Shire: I do not have a memorandum in this case.

The Court: I thought you said you had a trial memorandum.

Mr. Shire: On the Boyd case. I considered this was a question of fact. I shall be happy to submit a memorandum within a very short time.

The Court: Give me the cases that you cited there a few moments ago.

Mr. Shire: 184 Fed (2d) 972 is the Niznik and Comodor cases. I do not have the citation for the United States of [21] America vs. Walter Kobil, the Eastern District of Michigan, September '51. The case of United States of America v. Stephen Konides, District of New Hampshire—I have not run these cases down, your Honor.

Mr. Real: I think they are in 107 Fed. Supp. I am not positive.

The Court: In which volume?

Mr. Real: 107 Fed. Supp., I think.

Mr. Shire: I will be very happy to run them down, your Honor, and digest them.

The Court: All right. You do that and I will rule on this case next Monday at 1:30.

Mr. Shire: If your Honor pleases, I have got to be at San Diego for trial.

The Court: Well, a week from Monday.

Mr. Shire: Pardon?

The Court: A week from Monday, then.

Mr. Shire: On the 17th.

The Clerk: Monday is the 17th.

Mr. Shire: I will submit these just as rapidly as possible, your Honor, and give Mr. Real a copy.

The Clerk: What time on that, your Honor.

The Court: Better make it 1:30 in the afternoon. I might be in the trial of a case.

(Whereupon a recess was taken until 1:30 p.m., Monday, August 17, 1953.) [22]

August 26, 1953—1:30 o'Clock P.M.

The Clerk: No. 22875-Criminal, United States vs. John Henry Wilson, charged as John Henry Hacker, for ruling on motion for judgment of acquittal.

The Court: That motion will be denied.

The defendant will be found guilty as charged in the Indictment.

Mr. Shire: If your Honor please, I have a motion for a new trial, a copy of which I am serving on the United States Attorney, and I would like to file it with the court.

(Mr. Shire filed a written Motion for a New Trial with the Clerk.)

And pending the time set for hearing on this Motion, if your Honor please, I wonder if the defendant may be referred to the Probation Department, so that his situation may be presented to the Court properly prior to sentence, and I wonder if the defendant may be released on the same bond pending that motion?

The Court: All right. I don't think the Proba-

tion Department is very busy at this time, so sentence will be imposed in this case next Monday morning. Well, I think [25] we better make it at 1:30. Will you be here at 1:30, Mr. Real?

Mr. Real: Yes, your Honor.

The Court: All right.

The Clerk: The 31st?

The Court: Yes.

The Clerk: Today is Wednesday.

The Court: That is right. I will have to postpone it. That will have to be on the 8th, then, at 1:30, the 8th of September.

Mr. Shire: And will the hearing on the motion for a new trial be held at that time also, your Honor?

The Court: Yes. [26]

Tuesday, September 8, 1953—1:30 P.M.

The Court: You may proceed.

The Clerk: United States v. John Henry Hacker, No. 22875.

Mr. Real: Ready for the Government.

Mr. Shire: Ready for the defendant.

The Court: You may proceed.

Mr. Shire: If your Honor pleases, the matter resolves itself into this. It is our contention that there was no substantial evidence in the Selective Service file to contravert the evidence and the contentions of the defendant that he was and is a minister in fact.

Now, we have previously discussed the section in the regulations.

Any standard set up by the U. S. Attorney in

arguing this matter, your Honor, that he isn't able to perform a marriage by reason of his age is answerable in this fashion.

First, the regulations set forth no such standard. They do not say that a minister who is able to perform a marriage within the state is exempt. They say a minister or one who has that following or that calling regularly performs such services.

Next, if the Congress of the United States intended that any such standard be set up it would be set forth in the Act, [28] if your Honor pleases, and it is not set forth in the Act.

I know of no other contention that the United States Attorney had in the case. I have examined the file carefully and I find no other evidence but that he was in fact a minister.

Now, I do not know by what legal reasoning the draft board could have arrived at that conclusion, that he was not in fact a minister; and I present to your Honor this: Here in this court could it be said, your Honor, that a man who is in fact a minister, who has a congregation, who has a church and regularly preaches to them as the Act sets forth, meets all the standards and having presented that to the draft board could it then be said that in fact he is not a minister.

Now, there is the point of our contention there is no substantial evidence or in fact any evidence whatsoever that he didn't—that he isn't a minister and he should have been classified as such and therefore there is a violation of the regulations—a violation of due process.

Mr. Real: Your Honor heard the arguments on the question as to whether or not the defendant is a minister. We don't have to go into that again.

This is a motion for a new trial. We will submit the motion.

The Court: As I stated once before if the matter were originally before me I might hold the defendant was a minister [29] but it is out of my hands. So, the motion for a new trial will be denied.

Have you seen the pre-sentence report, counsel?

Mr. Shire: No, your Honor, I have not, but I talked to the probation officer and understand what went into it, so I do not deem it necessary to read it after having talked with him.

The Court: All right.

Mr. Shire: Your Honor, I should like to be heard on the matter of sentence.

The Court: Very well.

Mr. Shire: If your Honor please, I respectfully disagree with your Honor as to whether or not your Honor could examine the file and determine there was not substantial evidence. But I respect your Honor's decision and I urge your Honor now to do this, in this case with this man. I believe the draft board was wrong. I am not a Jehovah's Witness. But I can see the viewpoint of this man and I can see how the draft board is wrong with him.

He in fact is not just a publisher or minister in a congregation but is the leader of a congregation and a minister to these people.

I urge that your Honor grant this man proba-

tion. I do not know how the people around there like him or like his congregation. I understand there are some derogatory remarks made, but that is not a question before this court. I believe [30] that he is entitled to his religion and we are entitled to ours.

He has no criminal record. He has never done anything wrong. He has led a good life and a Christian life and a decent life. I believe that the draft board was wrong, your Honor. Your Honor has it within your power to correct that wrong by leniency and mercy and I so request your Honor and ask for that in his behalf.

The Court: I doubt that he is entitled to probation. Will you please stand up? Is there anything you would like to say before sentence is imposed on you?

The Defendant: No, except, your Honor, I have the duty and obligation to minister to my congregation and I have done that.

The Court: You will be committed to the custody of the Attorney General for two years.

Mr. Shire: If your Honor please, may I have just a moment? It is my desire in this case to file a notice of appeal and if your Honor please, I move the court for a bond in the amount of $2,500 and ask that the defendant be released pending the result of the appeal and during the appeal upon that bond.

The Court: All right.

Mr. Shire: Now, may there be a stay of execu-

tion for 24 hours until I file the necessary papers?

The Court: Yes.

(Whereupon the above-entitled matter was concluded.)

[Endorsed]: Filed, October 2, 1953. [31]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 21, inclusive, contain the original Indictment; Waiver of Jury; Motion for Judgment of Acquittal; Motion for a New Trial; Judgment and Commitment; Notice of Appeal and Designation of Record on Appeal and a full, true and correct copy of Minutes of the Court for June 1 and 22, August 4, 17 and 26 and September 8, 1953, which, together with the original exhibits in the case and Reporter's Transcript of Proceedings on August 4 and 26 and September 8, 1953, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $3.20 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 8th day of October, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14072. United States Court of Appeals for the Ninth Circuit. John Henry Hacker, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 9, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
Ninth Circuit

No. 14072

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

POINTS UPON WHICH APPELLANT WILL RELY, PURSUANT TO RULE 17 (6); DESIGNATION OF RECORD MATERIAL TO CONSIDERATION

The points upon which the appellant will rely in substance are:

1. The denial of the ministerial exemption is arbitrary, capricious and without basis in fact, for the uncontradicted and unimpeached documentary evidence in the draft board file shows that petitioner (appellant) pursued his ministry as his vocation.

2. Failure of the local board to make a full summary of the oral evidence given by appellant upon personal appearance concerning the reason why Jehovah's Witnesses do not salute the flag, and whether they sold literature and engaged in commercial work, deprived petitioner (appellant) of a full and fair hearing before the local board.

3. The fact that one cannot perform a marriage

service under the laws of the State of California is not a test of whether or not one is a minister within the meaning of the statute and the regulations exempting all ministers of religion.

4. Part-time secular activities performed incidental to the ministry do not remove one from the classification of "minister" within the meaning of the statute and the regulations exempting ministers of religion who preach as their vocation.

5. Appellant designates the following record which is material to the consideration of his appeal:

All of the reporter's transcript, together with all of the exhibits received in evidence or marked as an exhibit, together with the indictment, the minutes of June 1, 1953, June 22, 1953, August 4, 1953, August 17, 1953, August 26, 1953, September 8, 1953, waiver of jury, motion for judgment of acquittal, motion for new trial, notice of appeal, designation of contents of record on appeal, judgment and commitment.

Dated: October 15, 1953.

/s/ HAROLD SHIRE,
Attorney for Appellant.

[Endorsed]: Filed October 17, 1953.

No. 14072

United States Court of Appeals
FOR THE NINTH CIRCUIT.

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

HAROLD SHIRE
208 South Beverly Drive
Beverly Hills, California

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

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No. 14072

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. The appellant was sentenced to the custody of the Attorney General for a period of two years. [16-17][1] The district

[1] **Bracketed numbers herein refer to pages of printed Transcript of Record in this case.**

court made no findings of fact or conclusions of law. No reasons were stated orally by the court for the judgment rendered. [16-17] Title 18, § 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charges an offense against the laws of the United States. The appellant was charged with a refusal to submit to induction contrary to the provisions of the Universal Military Training and Service Act. [3-4] This Court has jurisdiction of this appeal under Rule 37 (a) (1), (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [17-18]

STATEMENT OF THE CASE

The indictment charges appellant with a violation of the Universal Military Training and Service Act. [3-4] It is alleged that appellant registered with Local Board 130 in San Bernardino County, California. It is alleged that he was finally classified in Class I-A, making him liable for military training and service. It is alleged that he thereafter was ordered to report for induction in the armed forces. [3-4] It is alleged that Hacker knowingly "failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [4] Appellant was arraigned. He pleaded not guilty. [4-5] He waived trial by jury. [5-6] The case was called for trial on August 4, 1953. [7] Evidence was heard. [19-33] A motion for judgment of acquittal was made at the close of the evidence. [8-10] It was briefly argued and the court then took the case under advisement and continued it until August 26, 1953. [10, 34] The motion for judgment of acquittal was denied. [10-11, 38] Appellant was found guilty on August 26, 1953. [11-12] A motion for new trial was filed. [12-14] Thereafter an order was made denying such motion. [15] A judgment of conviction was entered on September 8, 1953. [16-17] Notice of appeal was duly filed. [17-18] Bail was

allowed pending appeal. [42] The transcript of the record, including the statements of points relied on, has been duly filed. [45-46]

THE FACTS

Defendant, born in Colorado on December 31, 1932, was named John Henry Wilson. Thereafter his parents were divorced and his mother took custody of him at an early age. She remarried to Haskell W. Hacker, the stepfather of appellant. At an early age he took the name of Hacker and abandoned the use of the name Wilson without getting the name legally changed. [21-22] Hereafter in this brief he will be referred to (as originally in his papers and in the indictment) as Hacker.

Hacker registered with his local board on January 3, 1951. (1)[2] A questionnaire was mailed to him on January 21, 1952. (1) He filed it on February 1, 1952. (8) He gave his name and address. (9) In Series VI he answered and said he was a minister of religion, regularly and customarily serving as such under the direction of Watchtower Bible and Tract Society since November 1, 1950. (10) Hacker showed that he had been ordained on September 20, 1942, at Los Angeles, California. (10) He referred to papers accompanying his questionnaire in proof of his ministry. He went into considerable detail. His proof supporting the claim in the questionnaire for ministerial status shall here only be briefly summarized.

Hacker referred to the order of General Hershey finding that Jehovah's Witnesses and Watchtower Bible and Tract Society were a recognized religious organization. (18) He attached a certificate of ordination duly issued on January 9, 1952, by T. J. Sullivan, Superintendent of Ministers

[2] **The draft board file (cover sheet) was received into evidence. [20] Each page therein is numbered twice. Numbers appearing at the top of the pages do not have a circle around them; numbers at the bottom are encircled. The numbers appearing herein in "parentheses" refer to the numbers at the bottom of the pages of the draft board file that are encircled.**

and Evangelists of the Society. This certified that Hacker had been duly ordained on September 20, 1942, and had been in the full-time ministry as a pioneer, acting under the direction of the society, since November 1, 1950. (18) The certificate stated that he was authorized to perform all the usual rites and ceremonies of Jehovah's Witnesses. (18) In a written statement accompanying the questionnaire he referred to the photostatic copy of the certificate or ordination. (18)

Hacker then emphasized the fact that he was a full-time minister of Jehovah's Witnesses. He stated that as such he was assigned to a congregation. In support of his having a congregation he referred to an affidavit of all the members of the congregation that he was its only full-time minister. (18) He said too that he worked for the Spanish church of Jehovah's Witnesses, the only Spanish church of Jehovah's Witnesses in California. (18) He then stated that his full-time vocation as a minister required his devoting one hundred hours preaching to the people outside of his own congregation. He said that he regularly and customarily preached as a missionary evangelist in the homes of the people for the purpose of building up the congregation to which he was assigned. (18)

In his typewritten statement accompanying the questionnaire he also showed that he had been preaching since early childhood. He stated he had been ordained and baptized in 1942 and that since that date to the date he became a full-time minister he had been acting as a part-time preacher under direction of the Society. (18) He referred to proof showing that since 1942 he had been preparing for the full-time ministry that he entered in 1951. (18) He emphasized by proof that despite his youth he was capable of serving as a full-time minister of religion. (18)

Hacker then stated an extensive review of his ordination. He said he had been formally ordained and that he had gone through the ceremony of baptism which is the ceremony employed by Jehovah's Witnesses. (19) He then

gave an extensive history of his ministerial service in different official capacities at different congregations. (20)

Hacker emphasized that the local Spanish congregation recognized him as their "only full-time minister." He referred to a petition signed by a large number of the members of the Spanish congregation. (20-21)

He stated that the most important part of his ministry was calling on the people in their homes. He spent one hundred hours per month of the time devoted to his ministry calling on people who have no other means of learning about God's Kingdom and of the purposes of Jehovah. (22) His vocation was this missionary work. (22)

Hacker referred to the fact that he had a part-time secular job. He had shown his part-time employment in his questionnaire. (11) He showed that he was working as bus driver for the Chino School District and that he received $1.40 per run. He averaged only about fifteen hours per week to the performance of such secular work. (12) In his separate statement he explained that each run averaged between one-half to one hour. (22) He received only $640.40 yearly for the performance of his duties as school bus operator. (22) He devoted his full time to the ministry and part time to secular work. He emphasized the fact that he drove the bus only early in the morning and late in the afternoon. (11) His employment extended only during the school months of the year. (11-12, 22)

Hacker stated in the separate statement that there were a large number of Bible study classes that he conducted in different homes as a minister of religion. (23) He referred extensively to his preparation and training for the ministry. He had been properly schooled for the ministry. (24) He filed certificates by two ministers who were instructors in the school certifying to his receiving proper training for the ministry. (25)

On February 4, 1952, the local board wrote to Hacker about his use of the name "John Henry Wilson" in his ques-

tionnaire. (27) Hacker answered and promised to supply a birth certificate later. (28)

The local board classified him in I-A on February 25, 1952. This made him liable for unlimited military service. (15) On March 15, 1952, he requested a personal appearance. (30) He was notified to appear on March 20, 1952. (34) At the trial in the court below he testified to some discrepancies in the memorandum made by the local board as to what took place at his personal appearance. (26-28) The discrepancies were not too substantial or necessary to mention. (26-28)

The memorandum of the personal appearance showed that Hacker claimed to be an ordained minister of Jehovah's Witnesses and that the congregation recognized him. Members of the board asked him if he could perform marriage ceremonies and if he had a regular church. (35) He showed that he was one of the few of Jehovah's Witnesses engaged in preaching full time. (35) In answer to the board's questions, he said he did not get paid from his ministry but made his living driving a school bus. (35) He was asked to supply information about his being fully ordained by ceremony and to get verification as to whether he could "perform marriages." (35)

On March 31, 1952, Hacker filed with the board a letter dated March 28. This letter referred to a certificate enclosed. The certificate showed that he was appointed as the presiding minister of the congregation and that he was duly ordained and authorized to perform marriage and burial ceremonies in the congregation. Accompanying the letter was a newspaper clipping showing he had preached a funeral discourse. (38)

Thereafter the local board, on April 21, 1952, classified him I-A. (15, 40) He was notified of this classification. (15)

On April 29, 1952, he appealed. (15, 41) His file was reviewed by Captain Sanders, the co-ordinator of District No. 6. Captain Sanders returned the file to the local board with request that it mail to Hacker a conscientious objector form. This was done on May 20, 1952. (15) Hacker returned the form unsigned and not filled out, stating, "I do not care to sign either of the two statements, since my claim for exemption is as a minister." (42)

The file was then forwarded to the appeal board. That board, on July 17, 1952, classified him in I-A. (15, 47) The local board also notified the employer of Hacker, Watchtower Bible and Tract Society, by mailing SSS Form 111 to T. J. Sullivan, Superintendent of Ministers and Evangelists for the Society at Brooklyn, New York. (15, 49) On July 21, 1952, the clerk of the local board wrote Hacker returning his birth certificate. The clerk notified him he was getting a new registration number because of the discrepancy in his birth date. Enclosed was notice of the classification given him by the appeal board. (51)

On October 24, 1952, Hacker wrote to the local board explaining why he could not sign the conscientious objector form. He said that the signing of the agreement in the form required him to voluntarily surrender his ministerial status which he refused to do. He offered to fill out the rest of the form if sent to him providing he would be excused from signing the agreement to give up his ministerial status. (56) He enclosed a copy of *The Watchtower* for February 1, 1951, showing that Jehovah's Witnesses are conscientious objectors. (56)

On January 2, 1953, the local board ordered Hacker to report for induction on January 14, 1953. (58) He reported on that date and refused to submit to induction when ordered to do so. He signed a statement to that effect. (60-66)

QUESTION PRESENTED AND HOW RAISED

The undisputed evidence shows that appellant is a minister of religion. It shows he was trained and ordained in his youth, that he began the full-time ministry long before his questionnaire was filed. At the time of his personal appearance it was undeniably established that he had no full-time secular work, but was working part time only as a driver of a school bus. The ministry was shown to be his vocation and that he did not pursue it incidentally to any full-time secular work. His claim was supported by two certificates of the Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. One indicated he was duly ordained and appointed as a full-time pioneer missionary evangelist of the Society. The other indicated he was the presiding minister of the local congregation of Jehovah's Witnesses. There was ample corroborating evidence from members of the local congregation that he was the only full-time minister in the congregation. There is nothing in the draft board file anywhere to suggest that the draft board questioned his evidence or the authenticity of his documents. There is no dispute of any of the evidence filed by him showing he was pursuing the ministry as his vocation. The undisputed evidence shows that the part-time secular work in no way interfered with the performance of his duties as a minister of religion.

Upon the personal appearance members of the local board placed significance upon the requirement that a minister show that he was qualified to perform marriage ceremonies under the law of California. While the board members asked appellant to supply information showing he was formally ordained, the record undeniably establishes that fact and there is no basis for question on his ordination.

The question presented, therefore, is whether appellant was denied the classification of a minister of religion, exempt from all training and service, without basis in fact and whether the classification given by the appeal board

was arbitrary and capricious and the result of illegal and irrelevant standards employed by the draft board.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal duly made at the close of all the evidence.

II.

The district court erred in convicting appellant and entering a judgment of guilty against him.

III.

The district court erred in denying the motion for new trial.

SUMMARY OF ARGUMENT

The denial of the ministerial exemption by the appeal board to the appellant is without basis in fact and the classification given to appellant is arbitrary and capricious.

I.

A PROPER CONSTRUCTION OF THE STATUTE AND THE REGULATION EXEMPTS ALL MINISTERS OF ALL RELIGIOUS ORGANIZATIONS PREACHING, AS THEIR VOCATION, THE DOCTRINES OF THEIR CHURCHES. THIS EXEMPTION PREVAILS REGARDLESS OF PART-TIME SECULAR ACTIVITIES PURSUED AS AN AVOCATION INCIDENTAL TO THEIR MINISTRY.

A.

A brief discussion of the legislative history behind the 1948 Act shows an intent to make the exemption broad and liberal.

The purpose of the exemption for ministers of religion

under the different draft laws was to give a legislative exemption. It has never been an executive deferment. No discretion is given to the administrative branch of the Government on this grant of Congress.

Congress intended to insure the people that all their ministers of religion would be kept home. It expressly stated that they would not be taken away. This was because they would have to preach to the people, bury their dead and marry their young.

Legislative history of the different draft laws shows that the exemption is not confined to the minister preaching from the pulpit. It was expressly stated that it extended to lay brothers and other nonpulpit-preaching ministers. The use of the term "regular minister of religion" in addition to the term "ordained minister of religion" shows the broad purpose of Congress. It is a catchall phrase, or a saving clause, to extend the exemption to all nonpulpit-preaching ministers.

The background of the law and the terms of the acts therefore show a definite congressional intent to place a broad and liberal interpretation upon the use of the words "minister of religion" in the act.

B.

The 1948 Act shows a continuing congressional intent to give a broad and generous exemption to ministers, so long as the ministry is pursued by them as their vocation.

Senate Report No. 1268, 80th Congress, 2nd Session, page 13, shows the first intent of Congress to restrict the exemption provided for ministers of religion. It demonstrated a purpose in the 1948 Act to confine it to only those who pursue the ministry as their "vocation."

The report used the word "leader." The word "leader" (in religions) used in the report is expressly controlled by reference in the report to the definition appearing in the bill. The controlling word "vocation" used in the definition of a "minister of religion" in the bill was not narrowed by

the use of the word "leader" in the report. The use of the word "leader" showed an intent to exclude only laymen from the exemption. It did not restrict the exemption of all ministers of religion who pursue the ministry as their "vocation." The act gives the exemption to all ministers of all religions who preach their doctrines as their "vocation."

Nothing appears in the act to show an intent of Congress to prescribe any standard way of preaching and teaching religion. Nowhere in the legislative history of the draft laws or in the 1948 Act is there any attempt to limit it. No definition of the term "preaches and teaches the principles of religion and administers the ordinances of public worship" is given by Congress or the regulations. The phrase is broadened by these words: "as embodied in the creed or principles of such church, sect, or organization." They show a congressional intent to let each separate group decide the proper qualifications of its ministers and methods of preaching to be employed.

No right to set itself up as a religious hierarchy was given to the Government. The absence of any fixed standards in the act rejects any argument of the Government as to what is orthodox in preaching and teaching by the minister claiming exemption. All methods of preaching and teaching of all religious groups done by their ministers was intended to be protected by the act.

C.

The terms of the act exempting men pursuing ministry as their "vocation" exclude consideration by the draft board or the court of time spent in incidental secular activities, as their "avocation."

Nothing is said in the act about the amount of hours or weekly or monthly time that may be devoted to some sideline or avocation by the exempt or deferred registrant. Judges when not at their work may run ranches or farms. Congressmen may have outside businesses. Others may pursue other avocations.

Only very few ministers of religion today are fully supported by their vocation. This has been true throughout the history of religion. The congregations are too poor to afford ministers all they require. That a poor preacher devotes part of his time, when not attending to his vocation of the ministry, to secular work does not take away his exemption. This secular work, like the outside financial activity of judges and other officials freed from military service, is wholly irrelevant. It may not be considered as basis in fact for denial of the exemption so long as it appears that the minister preaches for his group as his vocation.

Hold that the clergyman of a rich church is exempt. But the preacher of a poor church is not! Yet they both devote the same amount of time to their vocations. Is not this discrimination against poor religious congregations? Is not it unequal law in favor of the rich congregations who have big churches? Congress did not intend this. Time devoted to outside activities was never intended by Congress to be used to discriminate. The sole criterion is: Does the minister pursue the ministry as his vocation? If he does, then Congress intended him to be exempt. This is so regardless of what he does when away from his ministry.

D.

Congress had in view historical practices of religions whereby ministers of all denominations preach, not only from the pulpit, but also upon the streets and from door to door. Congress intended to include all kinds of religious preaching and not restrict it to any one practice, and especially that of the itinerant ministers who are the only source of religious instruction for over 70 million people in this country.

The act uses the term "as embodied in the creed or principles of such church, sect, or organization." This shows that Congress had in mind the history of religion. History of religion, especially of the Christian religion, shows that preaching has never been confined to the pulpit. It extends to ag-

gressive preaching in the streets, in the parks and from door to door. It includes preaching in the homes to many, when invited or with consent of different small groups. It covers any means or place where the good news of God's kingdom can be taught.

Both Biblical and secular writings show that the Christian church began with itinerant ministers. They preached to the people at the doors, in the homes and upon the streets. They spoke also to great multitudes at the seashores and in the market places. Ancient, medieval and modern history of the different Christian faiths shows that these primitive methods have never been abandoned. These methods of the Founder of Christianity are still ready instruments and potent forces of all the different religions.

A study of religious history shows that preaching is not confined to the use of the oral word. Preaching, in modern times, has reached out to include the written word. Books, booklets and pamphlets, containing written sermons, are the ready and effective instrument of the modern missionary, evangelist and minister. Congress had in mind protecting this method of preaching. There is nothing in the history or the act to show that it was not included.

All methods of preaching were included by Congress. Besides that, the ecclesiastical determination by Jehovah's Witnesses on the use of literature as an aid to or substitute for the oral sermon is binding on the Government. None was left out of the exemption granted by Congress.

E.

Benefits received by the federal Government from the work of all religion in this country were known to Congress and because of them Congress intended to reciprocate by giving to the words "vocation," "preach" and "teach" as broad a meaning as is reasonably possible so as to protect all religions.

The work of the itinerant minister, as well as that of the pulpit preacher, bears burdens that otherwise would fall

upon the Government. The value of the work these take off the shoulders of the Government cannot be estimated in dollars and cents. It is so very great that it calls for a reciprocal attitude of generosity and liberality from the Government toward religion where laws favoring religion are concerned.

This rule of generous construction applies to the construction of the act, enforcement of the exemption and the term "vocation" used in the definition of the term "minister of religion" appearing in the act.

II.

UNDER THE STATUTE AND REGULATIONS IT IS THE DUTY OF THIS COURT TO HOLD THAT THE ECCLESIASTICAL DETERMINATIONS MADE BY JEHOVAH'S WITNESSES ON WHERE AND HOW APPELLANT PREACHES IS BINDING ON THE DRAFT BOARDS, THE GOVERNMENT AND THE COURTS.

A.

The law frees all religious organizations from every governmental inquiry and judicial control of religious matters relating to the ordination of ministers and the manner and the place of their preaching.

Suppose Congress had not expressly provided that it was up to the judgment of each different religious organization to say what shall constitute the qualification of its ministers and the method of their preaching. Still it should be and the Court would read that right into the act.

Congress left all ecclesiastical decisions on qualification of ministers and method of preaching up to the religious organizations. This was done expressly. It said: "as embodied in the creed or principles of such church, sect, or organization."

Had Congress remained silent on such matters it would still be the same. The law of the land is that such issues are not for the Government. They are for the religious organization to decide. Their decisions are final, both under common law and under the Constitution.

B.

Under the act and the regulations the Government is not permitted to make an assault on the ecclesiastical decisions of any unorthodox and unpopular religious organization and deny rights under the act and regulations to a minister of that group by making an illegal invasion of the religious field reserved to the governing body of the church. It cannot fix tests of heresy. The Government cannot by law seek to compel religious conformity in violation of the above-stated rule of religious immunity and the commands of the First Amendment of the United States Constitution under the guise of enforcing the draft law.

Whether a religious group shall confine its membership to its ministry (as do all missionary societies) is a religious prerogative and decision that cannot be questioned by the Government. If a religious group decides to do its main preaching to the "lost sheep" (John 10:16), such as the 70 million nonchurch members in the United States, by going to them at their homes, then that is an ecclesiastical determination. It too cannot be questioned by the Government. That a religious group decides to concentrate its preaching methods on those used by the primitive Christian church —door to door, in the homes and upon the streets—so as to reach the poor rather than confine their preaching to the pulpit methods of the clergy of the rich churches, is also an ecclesiastical determination. It also cannot be questioned by the Government.

It is beyond the competency of this Court or the Government, according to the decisions of the Supreme Court, to question the religious practices of any group, so long as they do not violate the law of morals, break into overt acts against peace and order of the community or invade the property rights of others. To permit the Government and the Selective Service System to do here what the Supreme Court has said they cannot do would be to resurrect the heresy tribunals of the inquisition. Yet they are condemned by Congress and the Constitution!

C.

If the act and regulations are construed so as to allow the Government, the draft boards and the courts to invade the ecclesiastical decisions of religious bodies and apply principles of religious conformity in determining who is qualified as a minister then, as construed and applied, the act and regulations will discriminate and be in conflict with the First Amendment of the United States Constitution prohibiting the establishment of a state religion and forbidding the abridgment of any rights to freedom of religion.

It would be unreasonable to interpret the law so as to let the Government act as a religious censor of ministers and preaching by religious organizations under the act. This Court must not construe the law so as to make it unreasonable. To do what the Government wants done is to produce absurd consequences and injustice. It will produce unconstitutional results by discrimination between religious organizations. It would set up orthodox state-church principles in violation of the separation clause of the First Amendment. Also it would abridge the freedom-of-religion clause of that Amendment. The interpretation the Government asks this Court to give to the statute should be rejected.

III.

THE UNCONTRADICTED AND UNIMPEACHED DOCUMENTARY EVIDENCE IN THE DRAFT BOARD FILE SHOWED THAT APPELLANT PURSUED HIS MINISTRY AS HIS VOCATION. THE DENIAL OF THE MINISTERIAL EXEMPTION, THEREFORE, IS ARBITRARY, CAPRICIOUS AND WITHOUT BASIS IN FACT.

A.

The facts showed that appellant was a full-time minister, known as a "pioneer." He preached in his missionary field as his vocation.

Appellant showed that he was a recognized minister of a

recognized religion. He was engaged in the full-time missionary work of Jehovah's Witnesses, known as a "pioneer." This was sixteen months before his first classification on February 28, 1952. He showed he never had full-time secular work but that he was in the full-time ministry before his first classification.

The undisputed evidence showed that he had been ordained. It showed that he was preaching in accordance with the creed and principles established by the religious group that he represented. He met the requirement of the statute in every respect. His ministry was his vocation.

The local board knew that he devoted his full time to the work of his ministry. There was no dispute that he pursued the ministry as his vocation. The papers in the record before the board and the undisputed evidence showed this. There was no question of weighing evidence.

The denial of the exemption was without basis in fact. This is as much so as if he had shown, by undisputed evidence, that he was a judge, a congressman or a governor and then was denied the rights given to those offices. No fact question was presented to the court below. Only legal questions as to interpretation of the law and applying it to the undisputed evidence were involved. The denial of the exemption was without basis in fact.

B.

The performance by appellant of part-time work as a school bus driver incidental to his vocation of the ministry does not constitute basis in fact for the denial of the exemption as a minister of religion.

C.

That Hacker occupied another office as a minister in the organization of Jehovah's Witnesses, the presiding minister of the Chino, California, Congregation of Jehovah's Witnesses, incidental to his work as a pioneer minister, does not affect his vocation as a full-time pioneer minister of Jehovah's Witnesses.

D.

Nothing said by the Government about the status of appellant as a full-time pioneer minister prevents his classification as a minister of religion based alone on that activity.

The contention of the Government that appellant is a mere book peddler and not a minister should be rejected. The act rejects the argument. The doctrine of finality of ecclesiastical determinations of a religious organization established by the Supreme Court destroys the argument of the Government. The method of preaching by appellant was fixed by the doctrine and creed of Jehovah's Witnesses. It cannot be questioned. The choice and determination of the group under the act and the law of the land is final and binding upon the Government and the Court.

Other ministers of other religious organizations that confine themselves to preaching by distribution of literature, as colporteurs—as well as Jehovah's Witnesses—are exempted from training and service. This administrative determination should be adopted by this Court. If it is applied here the Government will be found to be properly out of court on its illegal contention.

The attack made by the Government upon the ordination ceremony of appellant and Jehovah's Witnesses was contrary to law. The attack was beyond the authority of the Government. The ecclesiastical determination by Jehovah's Witnesses as to the ordination ceremony for its ministers is binding on the courts. That it was identical to the ordination ceremony of Christ Jesus, his apostles, his disciples

and all the ministers of the early church left the Government without grounds to question it.

The documentary evidence submitted by appellant to his draft board that was prepared by other persons was sufficient. It corroborated his claim for exemption. The draft boards did not question it. They never rejected it. The board was satisfied with it. The Government has no authority to reject the documents. If they were satisfactory to the draft boards they cannot be questioned for the first time by the Government after the time to bring in stronger evidence had expired, since the board did not call for it.

The only place the documentary evidence submitted could be questioned was in the draft boards. This was the only tribunal where he could answer or offer evidence. The administrative tribunal did not call for stronger proof. It seemed to be satisfied with what he submitted. Now it cannot be contended (when he cannot answer *nunc pro tunc* and supply stronger evidence) that what documentary evidence he submitted was not sufficient.

Youthfulness of Hacker cannot be raised by the Government as basis in fact for the denial of the exemption. The act and the regulations do not make this an element of any exemption or deferment. It was never raised by the draft boards. It was not a factual basis for the denial. The act provided for an 18-year-old man to claim the exemption. Congress, therefore, closed the mouth of the Government. It has no right to rewrite the law and change the regulations fixed by Congress. The limit of authority of the Government was to read the law straight. It has no right to legislate new provisions in the law.

It is significant that even the local board (it actually saw Hacker) did not say anything about his youthfulness. The youthfulness is immaterial. If he was old enough to register under the act he was old enough to claim the benefits of exemption for ministers under the act. Congress settled the question. Youthfulness under the law is entirely moot to the case.

ARGUMENT

The denial of the ministerial exemption by the appeal board to the appellant is without basis in fact and the classification given to appellant is arbitrary and capricious.

I.

A PROPER CONSTRUCTION OF THE STATUTE AND THE REGULATION EXEMPTS ALL MINISTERS OF ALL RELIGIOUS ORGANIZATIONS PREACHING, AS THEIR VOCATION, THE DOCTRINES OF THEIR CHURCHES. THIS EXEMPTION PREVAILS REGARDLESS OF PART-TIME SECULAR ACTIVITIES PURSUED AS AN AVOCATION INCIDENTAL TO THEIR MINISTRY.

A.

A brief discussion of the legislative history behind the 1948 Act shows an intent to make the exemption broad and liberal.

The present act is similar to the regulations under the 1917 Act. (Selective Service Law of 1917, 40 Stat. 76, 50 U. S. C. § 226) It is slightly different from the 1940 Act. (54 Stat. 887, 50 U. S. C. App. §§ 301-318) The difference is that the 1948 Act adds to the 1940 Act the provisions of the Selective Service Regulations under the 1917 Act. The regulations under the 1917 Act required that ministers who pursued the ministry as their vocation be exempted by the law. They could not, however, be exempt by preaching as an avocation.—Selective Service Act of 1948, 62 Stat. 624, § 16(g), 50 U. S. C. App. § 466(g). Cf. 65 Stat. 87.

The ministerial exemption of the 1917 Act was commented upon in Congress when the act was considered. Spokesmen for the bill stated that the exemption was for a special purpose. It was to avoid taking the minister "away from his congregation." Congress intended to leave someone at home "to preach to the people, to bury the dead, and marry the youth of the land." (*Congressional Record,* Vol. 55, pp. 963, 1473, 1527) General Crowder, the Provost

Marshal General, gave testimony before the House Committee on Military Affairs. He said that the ministerial exemption was a legislative exemption. It was an exemption. He said it was not a deferment by the executive branch of the Government.—*Congressional Hearings,* 65th Congress, 1st Session, pages 94, 95.

The 1940 Act provided for the exemption of ministers of religion. There was no detailed definition in the act. (54 Stat. 887, 50 U. S. C. App. § 305) Section 622.44 of the Selective Service Regulations under the 1940 Act explicitly defined the terms "regular minister" and "duly ordained minister." They implemented the act. (32 C. F. R. § 622.44 (b))—See also *Cox* v. *United States,* 332 U. S. 442.

Congress intended in that act to provide for a very broad and liberal interpretation of the term "minister of religion." (See the letter of Congressman Martin J. Kennedy to the House Committee on Military Affairs.) There was a definite intent to exempt all full-time ministers, whether they were lay brothers, ministers performing administrative duties or clergy preaching from the pulpit.—See *Hearings before the Committee on Military Affairs,* House of Representatives, 76th Congress, 3rd Sess., on H. R. 10,132, at pages 299-305, 628-630.

General Hershey, Director of Selective Service, stated the attitude of Congress. He said there was "a natural repugnance toward any proposal for drafting ministers of religion for training and service." (*Selective Service in Wartime* (Second Report of the Director of Selective Service 1941-42), p. 239, Washington, Government Printing Office, 1943) The purpose of the exemption appearing in the 1940 Act was stated by the United States Court of Appeals for the Second Circuit in *Trainin* v. *Cain,* 144 F. 2d 944 (1944). The reason was to prevent "disruption of public worship and religious solace to the people at large which would be caused by their induction."—144 F. 2d at p. 949.

The above legislative history shows a national policy to exempt ministers. This policy was expressed in both the

1917 Act and the 1940 Act. This showed a broad and liberal exemption intended by Congress to protect ministers. Concerning the administration of the ministerial exemption under the 1940 Act, General Hershey, the Director of Selective Service, said: "The determinations of this status by the Selective Service System have been generous in the extreme."—*Selective Service in Wartime* (Second Report of the Director of Selective Service 1941-42), p. 240, Washington, Government Printing Office, 1943.

It can be seen that Congress intended to be fair and liberal in its exemption of ministers of religion from military training and service.

B.

The 1948 Act shows a continuing congressional intent to give a broad and generous exemption to ministers, so long as the ministry is pursued by them as their vocation.

The only difference between the 1940 Act and the 1948 Act is that the 1940 Act did not require that the ministry be pursued as a vocation. The 1948 Act was specifically changed. It made the definition of a minister identical to the definition appearing in the Selective Service Regulations under the 1917 Act. The Report of the Senate Committee on Armed Forces stated that the definition of the terms "regular or duly ordained minister of religion" appearing in the act were defined in § 16(g). Concerning the definition the report said: "The definition is that which was contained in the 1917 Selective Service Regulations, and which was successfully administered without the problems which arose under the 1940 Act."—Senate Report No. 1268, 80th Congress, 2nd Session, page 13.

The indictment was returned pursuant to the provisions of Section 12(a) of the Universal Military Training and Service Act (50 U. S. C. § 462(a), 62 Stat. 622). Section 6(g) of the act reads as follows:

"Regular or duly ordained ministers of reli-

gion, as defined in this title, and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools, or who are satisfactorily pursuing full-time courses of instruction leading to their entrance into recognized theological or divinity schools in which they have been pre-enrolled, shall be exempt from training and service (but not from registration) under this title."—50 U. S. C. § 456(g), 65 Stat. 83.

Section 16(g)(1), (2) and (3) reads as follows:

"(1) The term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and to teach the doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

"(2) The term 'regular minister of religion means one who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

"(3) The term 'regular or duly ordained min-

ister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization."—50 U. S. C. § 466(g) (1), (2) and (3), 65 Stat. 87.

Section 1622.43 of the Selective Service Regulations provides:

"1622.43 *Class IV-D: Minister of Religion or Divinity Student.*—(a) In Class IV-D shall be placed any registrant:

"(1) Who is a regular minister of religion;

"(2) Who is a duly ordained minister of religion;

"(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

"(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled."
—32 C. F. R. § 1622.43.

To be a "duly ordained minister of religion" under the Universal Military Training and Service Act, certain things must appear. First is that the person be ordained. Second

is that he be ordained in accordance with some religiously established discipline. Third is that he be ordained to preach the doctrines of a church or organization and to administer the ceremonies in public worship. Fourth is that he pursue his ministry as "his regular and customary vocation," preaching the principles of his religion and administering the ordinances of public worship of his church.—65 Stat. 75, 87, § 16(g), 50 U. S. C. App. § 466(g).

A "regular minister of religion" under the act is also defined. Congress says that a man is a "regular minister of religion" when he teaches the principles of his religion without having been formally ordained. (65 Stat. 75, 87, § 16(g), 50 U. S. C. App. § 466(g)) Congress in this section specifically limits the definition of the term "regular or duly ordained minister of religion." It says that it does not include a man who preaches incidentally the principles of his church, either as a regular or duly ordained minister. Congress adds that it does, however, include every minister who preaches, either as a duly ordained minister or as a regular minister, the principles of his church "as a vocation."

Please notice that Congress in the report of the Senate Committee on Armed Service stated that the exemption was limited to the "leaders of the various religious faiths, and not for the members generally." (Senate Report No. 1268, 80th Congress, 2nd Session, page 13) It is plain from this report that Congress intended to exclude those who were not full-time ministers or not leaders of religion. Congress intended to exclude all the laymen but none of the full-time ministers.

The word "leader" used in the Senate report must be specifically qualified by the definition of "minister of religion" appearing in the act. The definition in the act specifically exempts a minister who preaches his religion as his vocation.

The use of the word "leader" in the Senate report appears to be irrelevant to the act. This is especially true since the report specifically adopted the definition appear-

ing in the act. The definition is clear. It is not ambiguous. There is no indefiniteness in the terms of the act. It does not use the word "leader." Since the definition is clear and not vague, the word "leader" used in the report cannot be read into the act, unless "leader" is synonymous to the words "minister of religion." A man who pursues his ministry as his vocation may properly be said to be the "leader" in his religion. This is so regardless of the name or nature of his denomination and where or how he preaches.

The word "leader" alone used in the report of the Senate Committee on Armed Service (Senate Report No. 1268, 80th Congress, 2nd Session, page 13) may not be used to qualify or to abridge the definition appearing in the act. One reason is that the report adopted the definition used in the act. It made the term a part of the report. The other reason is very well expressed by the Supreme Court in Ex parte *Collett,* 337 U. S. 55, at page 61.

The Government cannot limit the word "minister" in the statute to a minister who preaches from the pulpit to a congregation of laymen under one roof. This is an illegal rewording of the statute. It excludes the ministers preaching the doctrines of their churches as their vocation and who have congregations under many roofs or no roof, the open street.

Today, as throughout history, many ministers are missionaries and evangelists. They have congregations only in the homes of the people. There they minister to the spiritual needs of their missionary flocks.

There is also the street preacher. His congregation is rarely, if ever, composed of "members" of his church. It is never fixed. The definition the Government gives the Court would exclude these thousands of ministers in the United States.

A reasonable reading of the act does not permit this clouding of the congressional intent. Congress certainly intended to protect the full-time minister of every religious organization. This is true even though he never preaches to

a fixed congregation anywhere. It is not necessary that the listeners be members. The people hearing him may be non-members of his church.

This broad interpretation is proved by the protection in the act for leaders who are executives in religious organizations. Congress intended to protect administrators of every religious organization. These administrators are either ordained or regular ministers. They rarely (if ever) preach. They have no congregations. Yet they are "ministers" or "leaders" in their churches. They are administrators of their churches. This is also the case where bishops and archbishops of the Catholic Church and the Anglican Church are involved.

The practice of many churches is to have clergymen or ministers performing administrative functions. They also teach in colleges. Do these men, therefore, cease to be exempt as ministers because they are not regularly serving a congregation? In neither case would the men serving in that capacity lose the protection of the statutory exemption. In short, every church has the right to have ministers. It should be free to appoint them to whatever function they are needed within the organization. If the regular minister of one church places men in functions different from some other religion, the law is not concerned. The law will not tell the various denominations how to operate their internal affairs.

Lay brothers of the Catholic Church are not priests or "ordained" ministers. None has a congregation. None preaches from the pulpit. As a class, as regular ministers, they perform duties of a menial nature. They are not executives. They are "administrators" of the lowest type in the Catholic Church. They never conduct religious services or perform any religious rites of any kind of a sacerdotal nature in the church.

Never do the lay brothers perform any act that is a part of all religious services in any Catholic Church. They are "unable to attain to the degree of learning requisite for

holy orders," but are "able to contribute by their toil" and are "able to perform domestic services or to follow agricultural pursuits."—See *The Catholic Encyclopedia,* Vol. 9, p. 93.

Lay brothers are regular ministers of religion under the act. See *State Director Advice 213-B,* as amended September 25, 1944, National Headquarters Selective Service System.

Special emphasis should be put on the term "regular minister of religion" used in the act. This shows an express intent on the part of Congress to protect all full-time ministers, regardless of whether they preach under one roof to those who are members of their church or not. The term "regular minister of religion" is a saving clause for religions. This term was included for the express purpose of protecting all ministers of religion who are not "ordained" ministers of religion.

The term "regular minister of religion" was declared by General Hershey, the Director of Selective Service, to be a very broad and generous term.—*Selective Service in Wartime, supra.*

His administrative interpretation of the term was adopted in *Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.), at page 638.

One difference (respecting exemption of ministers) was made by Congress between the 1940 Act and the 1948 Act and current Act. It was the requirement that to be exempt the minister of religion pursue his ministry as his vocation. Congress, by the use of the word "vocation," precluded the possibility of any minister who pursued full-time secular work from being classified as a minister, when it appeared that he preached only part time. Congress intended by the use of the word "vocation" to protect only those ministers who made their ministry their main job.

The only criterion Congress imposed upon each such minister was that he pursue his ministry as his vocation. When the minister shows that preaching is his vocation, there is only one answer. He is a minister of religion ex-

empted under the act and regulations. The exemption comes even if he has no cathedral. He should be exempt even if he is without a congregation under one roof. He is exempt when he shows that his ministry is his vocation. His vocation of the ministry makes him a "leader" in his organization. As a leading minister of his group he pursues his work as his vocation. He has been exempted by Congress.

C.

The terms of the act exempting men pursuing ministry as their "vocation" exclude consideration by the draft board or the court of time spent in incidental secular activities, as their "avocation."

The only thing the act requires the minister to show is that the ministry is his "vocation." Nothing is said in the statute about activities he carries on when not preaching. The law allows him to have a sideline. He may have several different interests outside his vocation. These interests often require much of his time not devoted to his vocation. The act exempts the minister because his ministry is his vocation. Then no consideration may be given to time devoted to incidental outside activities, so long as the ministry is his vocation.

To demonstrate the error of the Government's argument (that *incidental* secular work can be the basis of the denial of the exemption) consider other deferments. There are deferments for governors, members of the state legislatures, congressmen, senators and judges of courts of record. (50 U. S. C. App. § 456(f), 32 C. F. R. § 1622.41) There are others. Mention of these is enough. In the act and the regulations granting exemption and deferments nowhere does it appear that the incidental time devoted to outside activity is made a basis for the denial of the exemption or deferment.

A judge may live on a farm and run it. In his spare time he may operate a ranch. Both of these jobs take much time

when the judge is not on the bench. A congressman or a senator may have some commercial business on the side. Many exempt or deferred persons may spend much time attending to investments. They may watch the stock market reports to judge what to do with their securities. This may take much time. Even a wealthy deferred person who has no need to run a ranch may devote his time away from his vocation to playing amateur golf or to the breeding of horses. He may devote much time to such pursuits when not engaged at his vocation. A congressman may devote much of his spare time to polo playing. This may take all of his time when not working at the job that deferred him from training and service in the armed forces.

A governor may spend his spare time running a coal business. He may engage in playing bridge professionally when not occupied with his duties as governor. In neither case would that be even remotely relevant to his right to deferment, which hinges on his vocation.

It is well known that in some Washington circles certain senators, congressmen and other governmental employees spend many hours weekly at social gatherings and parties. This they do often when out of their offices, during the week and on week ends. The fact these persons devote such time to help them climb up the slippery slope of politics (among other probable reasons) does not in any way affect their deferred status under the draft law. That is dependent upon the vocation which they pursue and not their sideline pursuits.

Recently the public press reported about an ordained minister who has gained world fame as a track star. He has devoted much time to training and participation in amateur competition. By the use of his time outside the ministry he reached the highest of athletic honors, the Olympics. Surely no one would dare say that, because he devoted much of his time when not preaching to training for track competition, such defeated his claim for exemption based on his vocation of the ministry.

A wealthy clergyman may devote all his spare time to caring for investments and collecting rental on real estate. This in no way takes his exemption from him. The only criterion is: does the minister pursue his ministry as his vocation? It is not: what does he do with his spare time?

A poor preacher of a financially weak congregation often is required to perform secular work to support himself incidental to his vocation of the ministry. Does this bar him from claiming the exemption as a minister of religion? Not as long as he regularly and customarily teaches and preaches, as his vocation, the doctrines and principles of a recognized religious organization.

The pages of history abound with proof that even ministers of orthodox denominations perform secular work during the week. This they must do as a sideline in order to sustain themselves in their ministry. Today some denominations have no paid clergy at all. Every minister in some denominations is required to perform secular work. Yet, as his vocation, he regularly and customarily teaches and preaches the doctrines and principles of his church as a minister. Upon this point "a page of history is worth a volume of logic."—Mr. Justice Holmes, *New York Trust Company* v. *Eisner,* 256 U. S. 345, 349.

From time immemorial the support of a preacher or minister has not been confined to aid from a congregation capable of supporting him financially. The poor financial condition of the congregation makes it necessary for him to depend on other sources for support and maintenance. In fact, ministers more often than not, especially in the rural sections, are forced to work on farms. They also work in rural stores and at other secular work to support themselves and their families. This they must do so that they might regularly and customarily preach to their congregations.

The source of a minister's income is wholly immaterial. Whether his congregation is able to provide him with an income sufficient to maintain him is not relevant. Whether

he is fortunate, is rich and able to maintain himself from stocks, bonds and property investments is not material. Also whether the minister, like most ministers, may not be financially independent is not material. He may have to depend on his labors for his support. That is also immaterial.

General Lewis B. Hershey, Director of Selective Service, stated in 1944:

> "In some religious organizations both practice and necessity require the minister to support himself, either partially or wholly, by secular work."—*State Director Advice 213-B,* as amended September 25, 1944, National Headquarters, Selective Service System.

A very large number of ministers of Protestant and Jewish denominations depend for their support upon secular work. In the Northern Baptist Convention twenty per cent of all clergymen in rural sections "help earn their keep by work not connected with their churches."—Hartshorne and Froyd, *Theological Education in the Northern Baptist Convention,* p. 72, Philadelphia, Judson Press, 1945.

Twenty-four per cent of all Protestant clergymen in the United States in 1939 received less than $600 annual salary from their respective churches, of which fourteen per cent received less than $99 annually. "There is nothing to indicate that those in the lower brackets also had other occupations, although it is a safe guess that many of them did." —Landis, Yearbook of American Churches, 1945, Federal Council of Churches of Christ in America, Lebanon, Pa., Sowers Printing Co., p. 155; see also United States Bureau of Census, Series P-16, No. 8, 16th Census.

It is well known that the majority of the ministers of the Society of Friends (Quakers), Church of Jesus Christ of Latter-day Saints (Mormons) and Mennonites are not supported by their churches. They and thousands of other ministers of other poor churches are dependent entirely

upon secular work for their support. No salary is paid to a large percentage of all American ministers.

It is outrageous to presume that Congress intended to discriminate between the wealthy clergy and the poor ministers. The wealthy clergyman can be exempt although he may spend many hours playing golf and bridge and engaging in extrasectarian activity during the week. He has a wealthy congregation that prevents him from having to work to support himself. The poor congregation and minister not thus blessed must suffer the penalties of the law. Because he uses the same amount of time working on a secular sideline that the wealthy clergyman uses attending to secular investments so he may stay in the vocation of the ministry, the poor preacher loses his rights!

Surely Congress did not intend to discriminate in favor of the rich and against the poor churches in this country. The poor, small churches in this country outnumber, many times, the wealthy. Congress must have had clearly in view the fact that to protect the churches of the poor it was necessary to allow their ministers pursuing the ministry as their vocation to engage in some sort of secular sideline. They have to have some secular work as an avocation to sustain themselves.

With the knowledge of these facts, surely it must be said that Congress intended to exclude from the consideration of the court and the draft board completely the secular sideline of the ministers unless secular work was the minister's vocation.

When secular work is the avocation, then regardless of such secular work as a sideline there is no basis in fact for the draft board classification denying the exemption based on the vocation of the ministry.

In determining whether there is basis in fact for a draft board determination the draft boards are limited as to what to consider. A claim for exemption or deferment under the act cannot be denied solely by a finding that the minister had other activities on the side. These would not,

within themselves, deny such person his exemption or deferment. Suppose the facts establish that such minister comes within the exemption under the act. His incidental side activities or secular avocation are wholly irrelevant and immaterial to his exempt status.

Let the Court again be reminded of the determination of the law that draft boards and Selective Service officials have no right and duty to deny exemption because of the part-time activities of those who make the ministry their vocation. If the officials can do this inquisitorial act to one organization, they can do it to all of them. Selective Service officials will become an army of religious spies following all preachers around to find out how much time they play golf and how long the wealthy ones spend checking on securities, collecting rents, writing books or other such activities.

The Court then must prepare itself to try the activity of every lay brother who looks after cattle or makes wine at a monastery, of every priest who helps print or censor propaganda, every minister who teaches at a theology school or who acts as registrar or administrative officer of such institution. It would put on the Selective Service System the burden of spying and snooping into the life of every minister.

If it is illegal for a minister to have a part-time avocation of a secular job, then it is equally illegal and destructive of his exempt status if the minister has an avocation of playing golf, operating a farm or engaging in athletic contests.

If devoting time to an avocation destroys the exemption of a minister, then the draft officials will also have to spy on senators operating a private law practice, judges playing bridge and congressmen going to cocktail parties. Instead of public servants in a free country the Selective Service System will become a new gestapo! Ridiculous you say? It is just as ridiculous as the poisonous argument the Government has put in a capsule to feed this Court.

—See *Dickinson* v. *United States,* — U. S. —, decided by the Supreme Court on November 30, 1953.

It is respectfully submitted that Congress intended not to permit the courts or the draft boards to nullify the intent expressed in the word "vocation" by an inquiry into the slight and inconsequential time devoted to the secular avocation of this minister of religion.

D.

Congress had in view historical practices of religions whereby ministers of all denominations preach, not only from the pulpit, but also upon the streets and from door to door. Congress intended to include all kinds of religious preaching and not restrict it to any one practice, and especially that of the itinerant ministers who are the only source of religious instruction for over 70 million people in this country.

Many different methods and customs of preaching will be found exposed in the pages of history. From the first organization of the Christian system through the medieval period down to modern times this appears. Any well-informed student of church history knows that there has never been any fixed or consistent form of preaching or religious practice.

The records of the nations run red with blood because of those who sought to impose fixed religious standards upon their victims. These bloody tragedies of history, such as the Thirty Years' War and the evils of the Inquisition, were preludes to constitutional guarantees of religious liberty. The Constitution refuses to allow Congress or anyone else to establish by law or administrative fiat any form of religion, as fixed or government approved. Congress knew these things. That knowledge of religious history is reflected in the act. The refusal of Congress to define any set mode of preaching or manner of appointing ministers or where they shall preach is significant.

Congress did not brush aside this religious history of

the world. That Congress did not say what was "preaching" and "teaching" proves that it had in mind the different methods of preaching shown in the history of the Christian church.

Congress knew the history of all the present Christian religious denominations in the United States. It knew their background. Knowledge of historical practices and customs of the early Christian church, the medieval church and the modern church was in view of Congress when the law was written. It was well informed on religious history. Congress knew that there could be no fixed religious belief or religious practice. Congress knew all are different. It had in mind making the law broad enough to cover all methods of religious preaching of all denominations. Congress intended to act in harmony with the Constitution and the practice of toleration shown by the history of this country.

A brief review of some of the early history of the Christian religion shows clearly the type of religious practice Congress must have had in mind when the exemption was written into the act.

The Scriptures show that the apostles and disciples of Jesus preached publicly on the streets and also from house to house. (Acts 20:20) The apostles and disciples of Jesus taught in this manner throughout the Mediterranean world. Jesus commanded his disciples to "teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost." (Matt. 28:19) No informed person or Bible scholar will dispute that the church of Christ refused to confine their preaching to the temple. They went into the highways and byways.

Jesus "went round about the villages, teaching." (Mark 6:6) Three times he made trips through Galilee. He also went into other parts of Palestine. No one will deny that the "Sermon on the Mount" was not delivered in a cathedral. It was preached in the open air.

In addition to the large open-air audiences to which Jesus preached, he also preached in the homes and by a

public well. He sent out seventy evangelists to preach through Judea. (Luke 10:1) Thousands of disciples of Jesus likewise preached publicly and in the homes of Jerusalem. They were led by Paul, Barnabas, Timothy and other disciples.—Acts 5:42.

From the very earliest period the Christian church had an itinerant as well as a local ministry. Both were recognized as vital in the establishment of the faith. All were recognized as ministers. The itinerants were officials in superior positions to those of the local ministry. The local ministers were chosen and appointed by the itinerants. Paul gave instructions to the young man Titus who was a traveling minister: "For this reason I left you in Crete, that you might correct the things that were defective and might make appointments of older men in city after city, . . . " —Titus 1:5, *New World Translation.*

No one can contend that the pulpit-in-cathedral preaching method since that time—regardless of how orthodox it may be—now has a position superior to the primitive method pursued by Jesus and his apostles. It is unreasonable to assume that Congress intended to condemn the primitive practices of Christ, his apostles, and the disciples.

Congress knew of the great part played by such itinerant ministers in American and English history. It certainly did not intend to discriminate against them.

Congressional intent to include all methods of preaching of all religious organizations is shown in the use of the term "as embodied in the creed or principles of such church, sect, or organization." This quoted term appears in the definition of the term "minister of religion" appearing in the act. Had Congress intended to limit the type of preaching protected or restrict the exemption to the popular religions it would not have used the word "such."

This matter is more particularly explained in the House Report No. 2438, Report from the Committee of Conference, to accompany S. 2655, the bill that became the 1948 Act. On

page 48 of the report it is shown that Congress intended not to limit the term or exclude any method of preaching.

The itinerant ministry is associated with the works of some of the greatest English and American clergymen and reformers. Wesley, Calvin, the Jesuits and many other important religious reformers have used house-to-house ministers to advance their religious endeavors.

It is now too late in the day to say that such ministry is not a recognized part of the religious life of the English-speaking world. It is well known and is protected by law.

Congress has provided for the regular or duly ordained ministers of all religions. It did not say: 'any religious denomination that has one minister attached to one congregation.' To say so would be to establish a state church of orthodoxy and deny the rights of those who have played an influential and useful part in the history of the nation. Congress has not so limited the statute and certainly this Court should not do so.

The practice of having an itinerant ministry as well as a pulpit ministry has a long and historically honorable record. Congress knew this. It must be deemed to have made a reasonable provision for such religious practices, the same as it did for other forms of religious preaching. The basic purpose of the exemption to give the influence of Christianity and its moral effect to the people has been shown. It has been very effectively served by such ministers. It would sabotage the true purpose of Congress not to allow ministers doing this very useful work to receive the protection contemplated. The itinerant ministers of the nation are engaged in a ministry that reaches a great class of people not otherwise touched by Christian pulpit preaching. In this activity they are entitled to the benefit of the statute designed to protect such activity and to save for the people the helpful influence of such works of charity.

Few, if any, orthodox religious pulpit clergy preach in the streets or at the homes. They depend upon the people

coming to them. They do not go to the people with the Word of God.

Suppose that all churches should become vacant. Assume the congregation leaves the minister in his cathedral without an audience. Then there would be a clear and present necessity of a back-to-the-church movement. The only way that the orthodox clergy could revive the people or get them back to church would be to preach from door to door. They would have to preach primitively as did the Lord Jesus Christ and his apostles.

The orthodox clergy in the pioneer days in this country actually called from house to house. They preached publicly on the streets in order to establish their churches in this nation. Even to establish a new church in a new community today it is necessary to seek converts or attendants at church by calling from door to door. It is, therefore, proper to assume that Congress had in mind this ancient and primitive method of preaching as a necessary means to preserve religion in this country.

Surely the regularly ordained clergyman with a congregation of lay members would not cease to be a clergyman because his flock quit coming to church. He would be exempt if he preached his sermons as did the Lord Jesus Christ and the apostles from door to door. Certainly the Government would not have the audacity to contend that if he did preach thus (after losing his congregation) he would lose his exemption as a minister of religion, because he was not preaching from a pulpit to a crowd gathered in his temple or cathedral.

The place in history of public preaching has been judicially recognized in the Scottish case, *Hutton* v. *Main,* (1891) 19 R. (J.) 5. Lord Justice Clerk said:

> "Street preaching is a familiar thing. Respectable persons gather, sing in order to attract the attention of those near, and thereafter preach to them. Other meetings in the open-air within burgh are equally free and informal."

The practice of preaching publicly from door to door is as old as the history of the Christian church. It has continued through the Middle Ages down to modern times, a potent force in religious endeavor. The Supreme Court has found that orthodox as well as unorthodox denominations have used it effectively. That Court has said that such practices have the same high estate under the American Constitution as preaching in churches and cathedrals. (*Murdock* v. *Pennslyvania,* 319 U. S. 105, 109) They have been an effective and potent force in the religious life of the nation for centuries.

That religion should be confined to the cathedrals, temples, church buildings and other privately-owned edifices flouts ancient and modern history. It also defies the religious need of the people of this nation. There are 70 million in this land who do not belong to any religion or attend church. —Landis, *Yearbook of American Churches,* 1952, p. 234.

Among the millions of church members there are millions who do not attend church. How would these millions of persons who do not attend church be comforted in sorrow, spiritually fed or educated by the Word of God if it were not brought to them by the evangelist at their homes?

The people would be left godless and without a knowledge of God's purposes were it not for the missionary evangelist. He takes the Word of God to these lost sheep by calling upon them at their homes. Also he preaches to them publicly on the streets. There is a clear and present necessity of legal protection of these millions by exempting the missionaries and evangelists who are willing to take religion to these people. The people have failed to take to religion. This is through failure to go to the religious edifices to be educated.

This modern need of the itinerant minister to keep up the religious morale of the people is well stated by J. Benson Hamilton, who said:

> "For reasons that need no explanation a large class of our people have a prejudice against our

> churches. They will not attend divine service in them whatever may be the attraction. To such the gospel must be preached by the way-side, on the street corner, at the sea shore, in the mountain, in the woods."—*Empty Churches and How to Fill Them,* p. 64 New York, Phillips and Hunt, 1879.

The evangelist and missionary doing ministry work in the homes of the people in this land are meeting the needs of these millions. The itinerant ministers do as much as, if not more, to maintain the morale of these many millions of churchless people than do the clergy with a numbered flock of members who speak from the pulpit.

The argument that worship is confined to church buildings is devastating to all religion. It is contrary to the Constitution. It defies the clear intent of Congress to be liberal and fair to all religions in the enforcement of the act. History and the need of millions for the service of the door-to-door evangelist, therefore, support the proposition that Congress must have had in mind the protection of the work of all ministers, peripatetic as well as pulpit, under the statute.

E.

Benefits received by the federal Government from the work of all religion in this country were known to Congress and, because of them, Congress intended to reciprocate by giving to the words "vocation," "preach" and "teach" as broad a meaning as is reasonably possible, to protect all religions.

The preaching activities of ministers of religion and evangelists bear burdens that ordinarily fall on the Government. They do work of an eleemosynary comforting nature. The Government would be required to do this if there were no religions. The Government would be required to impose additional taxes. It would have to make heavier demands

on all the people. It might have to draft people to do the work of charity. Christian preaching to the people of this land does what the Government could not possibly do.

The value of the moral restraints placed upon the people by the work of ministers and evangelists cannot be limited. An invaluable sense of personal duty to principles of justice and righteousness results from the work of ministers of all religions. It is not confined to the general populace. Politicians, officials of government and all public officers are constantly reminded of this sense of responsibility to these principles that comes from preaching.

If democracy is to last, ministers must be kept free from compulsory military service. The dry-rot of internal corruption has destroyed some of the greatest nations on earth because of lack of Christian principles. Preaching and proselytizing the people through the Word of God is an insurance against barbarism and disintegration of the nation.

Godless communism, which makes the worship of the state the religion of the people, condemns the exemption of ministers of religion from military service. But such is not the concept of this democratic state.

The Government cannot treat the work of house-to-house missionary evangelists as a matter of no great moment. Their work is a matter of national importance that contributes to the welfare of the nation as much as the work of the orthodox clergy preaching from the pulpit. Their charitable works "constitute not only the 'cheap defense of nations,' but furnish a sure basis on which the fabric of civil society can rest, without which it could not endure." —*Trustees of First M. E. Church South* v. *Atlanta,* 76 Ga. 181, 193.

Exemptions in favor of religion have always been given a broad and liberal interpretation.—*Trustees of Griswold College* v. *State,* 46 Iowa 275; *Watterson* v. *Halliday,* 77 Ohio St. 150, 82 N. E. 962; *Mattern* v. *Canevin,* 213 Pa. 588, 63 A. 131; *Congregational Society of Town of Poultney* v.

Ashley, 10 Vt. 241, 244; see also *Saskatchewan Ruthenian Mission* v. *Muldore,* (1924) 2 D. L. R. 633, 635.

It is respectfully submitted that the exemption in the statute should be construed liberally to give all ministers who pursue the ministry as their "vocation" freedom from service. To interpret the statute so as to cover only the orthodox clergy, and not the evangelist and missionary, is to discriminate. This would violate the principle of "equal justice under law."

II.

UNDER THE STATUTE AND REGULATIONS IT IS THE DUTY OF THIS COURT TO HOLD THAT THE ECCLESIASTICAL DETERMINATIONS MADE BY JEHOVAH'S WITNESSES ON WHERE AND HOW APPELLANT PREACHES ARE BINDING ON THE DRAFT BOARDS, THE GOVERNMENT AND THE COURTS.

A.

The law frees all religious organizations from every governmental inquiry and judicial control of religious matters relating to the ordination of ministers and the manner and the place of their preaching.

From the very beginning of the common law a realistic approach to the enforcing of statutes involving religious organizations has been made. Read *Thornton* v. *Howe,* 31 Beavin 14. In that case Sir John Romilly said that the law makes "no distinction between one religion and another. . . . Neither does the court, in this respect, make any distinction between one sect and another."

After the Civil War it was held in *Watson* v. *Jones,* 13 Wall. (80 U. S.) 679, that it was beyond the competency of the courts or any governmental agency to inquire into ecclesiastical determinations made by a religious organization.

See the comment of the Supreme Court on this holding recently in *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94, at page 116.

Some time after the decision in the case of *Watson* v. *Jones,* 13 Wall. (80 U. S.) 679, the Supreme Court decided *Gonzalez* v. *Archbishop,* 280 U. S. 1. In that case there were involved rights to a chaplaincy under a will. The point for determination was whether he possessed the qualifications as heir. The Court held that the qualification order of the church was beyond question by anyone other than the ecclesiastical hierarchy making the decision.—See 280 U. S., at pp. 16-17.

More recently the Court decided in *United States* v. *Ballard,* 322 U. S. 78, that the truthfulness of religious doctrines and practices is not subject to review by either the judge or the jury. This statement was made in a prosecution under the Mail Fraud Statute.—See 322 U. S., at pp. 86-87.

It is not for this Court or the draft boards to enter the religious field. They may not inquire whether the religious organization and its ministers are conducting themselves according to orthodox standards. The decision by a religious body as to the method of preaching by its ministers and their qualifications is final. This decision, however strange and unorthodox it may be, is unquestionable by the courts or the draft boards.

The order by a religious missionary organization, to have no laity members but to confine its membership to only its itinerant ministers, is final. It is not subject to any kind of attack by any governmental agency. It is the duty of the courts and the draft boards to recognize and give effect to the decision of the legal governing body of a religious organization. On all religious questions involving a registrant who is a minister of that organization, the decisions are final.

The only question for decision of the draft boards or the courts on judicial review in draft prosecutions is whether or not the minister pursues his ministry as his vocation and not incidental to some full-time secular job. Neither the courts nor the draft boards are authorized to

go beyond that question and conduct a heresy trial on the propriety of the religious training, beliefs and practices of the registrant and the religious organization of which he is a minister.

B.

Under the act and the regulations the Government is not permitted to make an assault on the ecclesiastical decisions of any unorthodox and unpopular religious organization and deny rights under the act and regulations to a minister of that group by making an illegal invasion of the religious field reserved to the governing body of the church. It cannot fix tests of heresy. The Government cannot by law seek to compel religious conformity in violation of the above-stated rule of religious immunity and the commands of the First Amendment of the United States Constitution under the guise of enforcing the draft law.

The Government may not turn the internal practices of a religious organization inside out. It may not compare them with the more orthodox practices of other churches. This leads to discrimination. The acceptance by this Court of that contention would result in the Court's setting itself up as a religious hierarchy. The Court then would be left without any standard to choose in determining what is right.

There is no one single standard that can be found for orthodoxy among the religions. Among the hundreds of different religious organizations in America there can be found no single norm of conformity. All are different. None conforms to another. The Government and the Court would be taken back into the inquisitions of the Dark Ages. The law would be changed so as to resurrect the ancient and iniquitous practices of test oaths. There were instruments of terror used by the religious inquisition of the Dark Ages.

If the draft boards and the courts were permitted to employ any one of the many different standards of orthodoxy to be found among the popular religions it would re-

sult in terror. Discrimination would be rife throughout the land. In a Catholic territory the Protestant minister would be denied exemption. A Protestant community would deny the Catholic priest his rights. Even the most orthodox would be in jeopardy in many communities.

Every time a change in the personnel occurred in a government agency, there would likely be a change in religion of the government agent. If the Government's practice be approved by this Court, then, instead of having government by the act and the regulations, the people will be governed by men and religion. Rights under the act would differ according to the swing of the pendulum, as the religious complexion changed with the appointment to government agencies.

In *Adelaide Company of Jehovah's Witnesses, Inc.* v. *Commonwealth of Australia,* 67 C. L. R. 116 (1943), the High Court of Australia said:

> " . . . it should not be forgotten that such a provision as S. 116 is not required for the protection of the religion of a majority. The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities. . . . It is not for the court upon some *a priori* basis to disqualify certain beliefs as incapable of being religious in character."—67 C. L. R., at p. 128.

It has been held that if the courts were permitted to inquire into religion, then "we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern* v. *Lutheran Churches,* 1 Sandf. Ch. 439, 507) Many cases have declared that all religions, Christian or pagan, stand equal before the law. (*Donahoe* v. *Richards,* 38 Me. 379, 409; *State* ex rel. *Freeman* v. *Scheve,* 65 Neb. 853, 879) It has been held that the doctrine of government inquiry into the ecclesiastical practices and ap-

pointments of religious organizations is contrary to "the spirit of religious toleration which has always prevailed in this country" and can never get a foothold so long as the government is forbidden to decide what religion is the true religion.—*Harrison* v. *Brophy,* 59 Kans. 1, 5, 51 P. 885.

In Ex parte *Cain,* 39 Ala. 440, the Supreme Court of Alabama had before it the case of a part-time minister who had a full-time secular job. He claimed exemption under the Conscription Act of the Confederacy. The same argument was pressed upon that court that the Government has advanced in this case. The court refused to pass upon the ecclesiastical determination. It said,

> "Neither this court, nor any other authority, judicial or executive, in this government, is a hierarchy, clothed with the power of determining the orthodoxy of any religious sect or denomination. It does not vary the question, in the present case, that Cain belonged to a sect of religionists who performed religious labor gratuitously."—P. 441.

The policy of the Government, being compelled by law to keep its hands out of the internal affairs of religious organizations, is well expressed in a Kentucky case. (*Klix* v. *Polish Roman Catholic St. Stanislaus Parish,* 118 S. W. 1171) The court said:

> "It would be tyrannical to coerce the different religious communions into the adoption of one rigid type of church government . . . ; and we do not see that the weal of the public in this commonwealth would be threatened by tolerating different kinds of church government any more than it has by tolerating different creeds and devotional rites."—118 S. W., at p. 1176.

The rule is very well stated by the Ontario Court of

Appeals. In the case styled *McPherson* v. *McKay,* (1880) 4 O. A. R. 501, Mr. Justice Patterson said:

> "The functions of a Court of law exclude the discussion of the doctrines, government or discipline of voluntary religious associations, except when they become elements in the adjudication of controversies respecting property, contracts or other civil rights."

In this case that is now before the Court there is no internal controversy subject to review. The Court has no lawsuit over property or contract; no civil rights are involved. There is no ground to go inside the organization.

Recently the Supreme Court reconfirmed the principle of law here contended for. It was in the case involving one of Jehovah's Witnesses. In *Fowler* v. *Rhode Island,* 348 U. S. 67, the Attorney General of Rhode Island attempted to get the court to decide that the giving of a public discourse in a public park was not religious services. The Court unanimously refused to grant the request of Rhode Island. —See 348 U. S., at pp. 69-70.

The Supreme Court went on to hold that if it did decide ecclesiastical questions by comparing Jehovah's Witnesses with other orthodox denominations, "the hand of the law would be laid on the shoulder of a minister of this unpopular group for performing the same function" as that performed by the more orthodox ministers.—348 U. S., p. 70.

Even in draft prosecutions all religious organizations from the outside look the same to the law. The Court must use the spectacles of the law. It can not put on glasses colored by any religion when it views Jehovah's Witnesses. Such an argument would close the door of exemption in the act on religion. By comparing one religion with another governmental agencies would become terror tribunals of conscience. The Court should not be led into a blind alley of religious inquiry. A multitude of ecclesiastical problems

will open up if such argument is followed. These questions are beyond the competence of draft boards and the courts. This is true as a matter of law. It is more true when viewed as a matter of learning. Very few if any secular judges are skilled in ecclesiastical matters as they were in times of old.

In ancient times the clergy were the judges. Now the judges are not the clergy. They lack the competence of the clergy on religious questions. In fact the law makes even the clergy incompetent to judge other ministers under the American system of government. This freedom stops the mouths of all persons.

No minister can question the propriety of another minister's religious practice or belief even though he be registered under the draft act. (*United States* v. *Balogh,* 157 F. 2d 939 (2d Cir.); vacated 329 U. S. 692; reversed on other grounds on rehearing 160 F. 2d 999 (2d Cir.)) All such religious questions are made irrelevant to inquiry under the draft law either before the draft board or the court. —*United States* v. *Balogh, supra.*

It must be remembered that the law laid down by this Court does not apply only to Jehovah's Witnesses. It will be a mandate by the Court to the Selective Service System to be enforced against all denominations. Let the Government, the courts and the draft boards be permitted by law to invade the internal practices of all religions! Ridiculous! Then such officials must make a detailed ecclesiastical inquisition into the practices of all the more than two hundred and fifty denominations in the United States. Any religions, or ministers, who do not come up to some unnamed and undefined ecclesiastical norm, in the view of the officials, will be denied legal protection by the Government inquisitors.

Many other minority and unpopular groups besides Jehovah's Witnesses would be denied their rights. Majority organizations also could be crucified. Why? They do not have any consistency of practice. The Government's argument must be carried to its logical conclusion in order to

test its validity. Cannot everyone see the indescribable maelstrom of confusion and evil that will result if the Government is allowed to prevail in this heresy-hunting argument? This sophistry of the Government is subversive of the Constitution that protects internal religious decisions from question.

The Government's effort may well lead the popular religions to an interesting parallel in history. A high government official of Persia was also afflicted with religious intolerance. He prepared a gallows upon which to hang a minister, a Jew. His scheming backfired on him. He was hanged on his own gallows that he himself built for the minister. The name of this official was Haman. The account of his downfall appears in the Bible, Esther, chapters 5 to 7.

The training of the minister, his appointment or ordination to preach and his preaching are ecclesiastical determinations. They are binding upon the Government. They must be accepted by the draft boards and the courts. The only question left open by the statute and the regulations is whether the minister is pursuing his ministry as his vocation and not incidental to a full-time secular job.

III.

THE UNCONTRADICTED AND UNIMPEACHED DOCUMENTARY EVIDENCE IN THE DRAFT BOARD FILE SHOWED THAT APPELLANT PURSUED HIS MINISTRY AS HIS VOCATION. THE DENIAL OF THE MINISTERIAL EXEMPTION, THEREFORE, IS ARBITRARY, CAPRICIOUS AND WITHOUT BASIS IN FACT.

A.

The facts showed that appellant was a full-time minister, known as a "pioneer." He preached in his missionary field as his vocation.

In his questionnaire appellant showed that in addition to working part time driving a school bus he worked as a minister. He showed that he was duly ordained. (10, 11-12)

He submitted an abundance of corroborative material showing he had been properly trained for the ministry, properly ordained and duly assigned to act as a full-time minister and presided over a congregation of Jehovah's Witnesses. (18-25) Nothing appearing in the memorandum made upon the personal appearance contradicts or questions the undisputed facts submitted to the board by appellant. (35) There is no contradiction of any of the statements appearing in the file that he is a full-time duly ordained minister of religion. Nowhere does it appear that a question of credibility was raised when he was before the board. Neither the local board nor the appeal board made any denials of the facts appearing in the file. Appellant showed that the ministry was his exclusive occupation, his vocation. Nothing appears in the file that the performance of his part-time secular work in any way interfered with his full-time ministry.

The records of the draft board, therefore, do not require the Court to weigh the evidence. This the Court cannot do. Weighing of the evidence becomes necessary when—and only when—there is a dispute in the file. Since there is no conflict in the evidence that he devoted his full time to the ministry, the question before the draft boards was a question of law. The boards had only to apply the law. The local board and the board of appeal were not authorized to deny a claim established by the uncontradicted evidence. It was said in *Dismuke* v. *United States,* 297 U. S. 167:

> "This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it." —297 U. S., at pages 172-173.

Recently the United States Court of Appeals for the Tenth Circuit held that where the evidence in the draft board file, filed by the claimant, was undisputed, there was no question presented of weighing the evidence. The court

held that the evidence was undisputed, and established the claim as a conscientious objector as a matter of law.—*Annett* v. *United States,* 205 F. 2d 689, June 26, 1953.

Approving and failing to distinguish the *Annett* case from the one before it, the United States Court of Appeals for the Second Circuit, on October 23, 1953, said, in *United States* v. *Pekarski* (No. 22636): "Though the court may not weigh the evidence before the local board and decisions of the board are final when based on evidence, subject only to administrative appeal, where there is no substantial evidence to support a classification made by the local board jurisdiction is lacking and the order of classification is a nullity. *Estep* v. *United States,* 327 U. S. 114."

An outstanding and correctly decided selective service case applying the above proposition of law is *United States* v. *Alvies,* 112 F. Supp. 618. In that case the evidence on the conscientious objector claim was offered only by the registrant. There was no disputing evidence in the file. The file did not indicate that the board questioned the credibility of the registrant. The Government argued that the draft boards had the right to disbelieve the defendant and the statements appearing in his documents. This was rejected by the court. Also the court distinguished legions of cases where a basis in fact for denial of exemption or deferment was found.—See 112 F. Supp., as pages 622-624.

Decisions applying the same principle above quoted and holding that the denial of the ministerial exemption was without basis in fact have been rendered. These decisions were: *Arpaia* v. *Alexander,* 68 F. Supp. 820 (D. C. Conn.); *Flakowicz* v. *Alexander,* 69 F. Supp. 181 (D. C. Conn.). In each of these cases the status of the man was that of a full-time minister of Jehovah's Witnesses occupying the same status with the organization as does appellant. The facts there match the facts here.

In *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.), a similar determination was made. That case involved the denial of the minister's exempt IV-D classification

by the National Selective Service Appeal Board. The evidence showed that Graham devoted almost 20 hours per week to part-time secular work, and over 100 hours a month to his ministry work. It showed that he was a full-time pioneer of Jehovah's Witnesses. The court said:

> "Nothing appearing to contradict or impeach the verity of his claim as a conscientious objector and as a minister, it is adjudged by this Court that the classification of the defendant in I-A is without any factual foundation."—*United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.).

A similar holding was made in *United States* v. *Burnett,* United States District Court, Western District of Missouri, September 1, 1953, 115 F. Supp. 141. See also *United States* v. *Milakovich,* No. C. 139-336, United States District Court, Southern District of New York, April 6, 1953. The decision is unreported but a printed copy accompanies this brief.

Under the 1940 Act, The United States Court of Appeals for the Seventh Circuit held that one of Jehovah's Witnesses had been illegally denied the ministerial exemption. The Court concluded that the denial of the IV-D classification was without basis in fact.—*Hull* v. *Stalter,* 151 F. 2d 633.

Congress did not intend to confer upon draft boards arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurdisdiction to weigh the testimony. It is then and then only that their decisions are final and binding on the courts. Where there is a denial of the ministerial status and there is no dispute in the evidence (the documentary evidence otherwise establishing that the registrant is a minister) it is the duty of the court to pierce through the shell and hold that there is no basis in fact. It must conclude that there is an abuse of discretion and that the classification is arbitrary and capricious regardless of the board's finding.

Such is the case here. The undisputed evidence shows that appellant pursued his vocation as a minister. This entitled him to Class IV-D. The denial of the exemption is without basis in fact. The I-A classification flies into the teeth of the evidence, is arbitrary and capricious. Such classification is a dishonest one, making it unlawful.—*Johnson* v. *United States,* 126 F. 2d 242, 247 (8th Cir.).

The case of *Estep* v. *United States,* 327 U. S. 114, held that if there was no basis in fact for the classification the action of the board was in excess of its jurisdiction. The Court said that judges may not question an erroneous decision if the evidence must be weighed.—327 U. S., p. 121.

There must be contradiction in the evidence or an impeachment of the registrant before there is a question of weighing the evidence. A board is the judge of a registrant's credibilty. If it fails to appear in the file that the board questioned a registrant's truthfulness, it must be assumed that the claims were judged on the basis of accepting the facts stated by him as true. We do not have here a case where the board denied the truthfulness of the testimony of the registrant.

The question for decision is only whether the undisputed evidence establishes no basis in fact for the classification. Better stated: Is there no basis in fact for the denial of the claim for the exempt ministerial classification?

The Selective Service Act of 1948 and the later Universal Military Training and Service Act (1951) are to be construed more liberally to the registrant than was the 1940 Act. The reason for this rule is to protect the registrant. It is well stated in Ex parte *Fabiani,* 105 F. Supp. 139 (E. D. Pa.).

It is not here contended that the Court should scrap the no-basis-in-fact rule stated in *Estep* v. *United States,* 327 U. S. 114. It does seem, however, that in applying the no-basis-in-fact rule under the 1948 Act the Court should be as liberal as possible to registrants. Reasons for this are stated in Ex parte *Fabiani,* 105 F. Supp. 139, at pages 145-

147. The rule of liberal interpretation should authorize the Court to hold that, if there is no contradicting or impeaching evidence that compels a weighing of the evidence, it must be concluded that there is no basis in fact for the classification or the denial of the claim for exemption as a minister.

The facts in this case are brought squarely within the rule announced by the court in *Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.). In that case the registrant was a full-time pioneer minister for the Watchtower Bible and Tract Society. That is the same status as the appellant has in this case. The rule applied in the *Hull* case ought to apply here. The language of the court is appropriate. That case involved an arbitrary classification of one of Jehovah's Witnesses. —See 151 F. 2d, at pp. 637-639.

Cox v. *United States,* 157 F. 2d 787 (decided by this Court), affirmed 332 U. S. 442, rehearing denied 333 U. S. 830, and *Martin* v. *United States,* 190 F. 2d 775 (4th Cir.), do not apply here. The reason is that in both of those cases the registrants had secular vocations. They devoted a large and substantial part of their time to performance of secular work at the time of final classification. In this case the evidence shows that appellant had no full-time secular job.

The minor, incidental hours each week devoted to secular work did not in any way prevent him from full and complete performance of his ministerial duties as his vocation. It did not interfere with his vocation. The evidence showed without dispute that he pursued the ministerial work as his vocation. It did not show that he performed the ministry incidentally to secular work as did the registrants in the *Cox* and *Martin* cases.

The *Cox* case was decided by a divided Court, five to four. No opinion was joined in by a majority of the Court. Mr. Justice Frankfurter merely concurred in the result. He did not agree with the opinion of the four justices with whom he agreed to make a majority and affirm the judgment of conviction.

Even the opinion of the four justices who decided against Cox in that case and in favor of affirmance does not control here. In the *Cox* case these four justices found that the defendants "spent only a small portion of their time in religious activities." Here the facts show appellant devotes many times more time to his ministry than he devotes to part-time secular work. The record also shows that he devotes as much time, if not more, to the performance of his ministry work as do the orthodox clergy.

The opinion of the four justices in favor of affirmance in the *Cox* case was also based on the fact that there was no "definite evidence of his full devotion of his available time to religious leadership" in each case. In this case we have more than appeared in the *Cox* case.

In *Cox* v. *United States,* 332 U. S. 442, there was no showing that the registrants pursued the ministry as their "vocation." The basis of the decision *was not that Jehovah's Witnesses are not ministers.* Nowhere did the majority say that they are not ministers. The majority merely concluded there was no showing that, by reason of the time the petitioners devoted to their ministry, they occupied a position of leadership as Jehovah's Witnesses. They had not dedicated their lives to the furtherance of the religious work of Jehovah's Witnesses. The Court based its decision on a failure to show that the ministry was their full-time job.

In the *Cox* case it was said that the evidence was submitted only by each petitioner. It was emphasized that there was no adequate supporting documentary evidence of their ministerial status. In this case there were filed numerous supporting affidavits. Also filed with the local board was a certificate issued to appellant by the Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. It certified that he had been engaged as a full-time minister since November 1, 1950, prior to his registration under the draft.

The evidence submitted to the board by appellant was not contradicted, discredited, or impeached by the local

board. The documentary evidence was accepted by it as true.

In the *Cox* case there was an issue of fact before the local board. In the case at bar there is no issue of fact. The fact situation is clearly within that involved in *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.). There is, moreover, no ground for the determination below. The rule stated in *Estep* v. *United States,* 327 U. S. 114, about no jurisdiction because no basis in fact applies.

Attention of the Court is drawn to the opinion of Mr. Justice Douglas, joined in by Mr. Justice Black, in *Cox* v. *United States,* 332 U. S. 442—Read 332 U. S., at pp. 456, 457. See *Dickinson* v. *United States,* — U. S. —, November 30, 1953.

The decisions in *Cox* v. *United States,* 332 U. S. 442; *Goff* v. *United States,* 135 F. 2d 610 (4th Cir.); and *Martin* v. *United States,* 190 F. 2d 775 (4th Cir.), have been made inapplicable by the explicit congressional definition of a minister in Section 16 of the act.

It is respectfully submitted that there was no basis in fact for the denial of the claim for ministerial exemption. Appellant should have been classified in IV-D. The I-A classification was arbitrary and capricious.

B.

The performance by appellant of part-time work as a school bus driver incidental to his vocation of the ministry does not constitute basis in fact for the denial of the exemption as a minister of religion.

The evidence showed that appellant devoted about fifteen hours a week during the school months of the year to driving the school bus. This enabled him to earn $640.40 a year. Together with help from other sources he was able to financially maintain himself in the ministry.

No extensive argument is needed to show that the performance of work for that amount of time did not make his secular work his vocation. It is also apparent that his vocation continued to be that of an ordained minister engaged

in regularly and customarily teaching and preaching the doctrines of Jehovah's Witnesses.

Hacker, as a pioneer minister of Jehovah's Witnesses, helped support himself by part-time secular work. Yet he actually devoted as much time to preaching and the duties of the ministry as do the orthodox clergymen, some of whom have congregations wealthy enough to support them without performance of secular work. He spent a minimum of one hundred hours monthly in house-to-house missionary work. Much more time he devoted to studying, attending special meetings, preaching before the congregation and performing congregational duties. The orthodox, church-sustained clergy, do not spend any more time in their activities. Yet they do not ordinarily sustain themselves by part-time secular work as does Hacker.

The court below, however, could have taken judicial notice of the fact that many poor preachers who work to support themselves are also aided by the congregations that they serve. The apostle Paul said: "The workman is worthy of his wages." (1 Timothy 5:18, *New World Translation*) Members of the congregation frequently give poor preachers meals, donate clothing to them, etc. The needs of the minister are often taken care of by gifts in order to see that he is able to continue in the Lord's work. Jesus indicated that if God can provide for the birds of heaven he can also support his ministers by causing gifts to be made to them. —Matthew 6:25, 26; Luke 12:22-24; Exodus 16:4; 1 Kings 17:6.

The fact that appellant may perform secular work in no way interferes with or prevents his performing his duties as a minister of religion. The source of financial revenue of persons excused by the act from the performance of training and service is wholly irrelevant and immaterial to the exemption and deferment granted by Congress.—See *supra,* pages 29-35.

It is plain that the vocation and calling of appellant —like many orthodox clergy who perform incidental secu-

lar work—is his ministry, rather than the inconsequential incidental work he performs.—See *Dickinson* v. *United States,* — U. S. —, November 30, 1953.

It is respectfully submitted that the part-time performance of secular work by appellant in no way interfered with his exempt ministerial status under the act. It provided no basis in fact for the denial of exemption as a minister of religion. He should have been classified IV-D. The placing of him in I-A classification was arbitrary and capricious.

C.

That Hacker occupied another office as a minister in the organization of Jehovah's Witnesses, the presiding minister of the Chino, California, Congregation of Jehovah's Witnesses, incidental to his work as a pioneer minister, does not affect his vocation as a full-time pioneer minister of Jehovah's Witnesses.

Hacker was the presiding minister of the Chino Congregation of Jehovah's Witnesses. The congregation is not a congregation of laymen. It is a group of ministers and missionaries. Whether each of these persons is qualified for exemption under the act is immaterial. It still remains that they are not laymen.

Appellant had two congregations. His first and main congregation was his congregation in the missionary field. There he preached in the homes of the people as a minister. This was quite a sizeable group of people. Together they made up his congregation. His other congregation was that which met together at the meeting place for Jehovah's Witnesses. It is called the Kingdom Hall. His duties at the meeting place were duties of a minister. They may be described as synonymous to the duties of an administrator in the office of some orthodox religious group.

Each one of Jehovah's Witnesses is a minister. This is because he has been ordained and preaches to his own congregation. The congregation of each is found in an assigned missionary field. Whether the congregation of Je-

hovah's Witnesses is an organized group of evangelists engaged in home missionary work, either part-time or full-time, is immaterial. It does not prevent the duties performed by appellant as presiding minister from being those of a minister of religion.

It should be remembered that the case involves the activities and work of appellant. The work and activities of other members of his congregation are wholly irrelevant and immaterial. That most congregations of the various religions are composed of laymen is immaterial. The orthodox yardstick of the clergyman in the pulpit, with laymen in the pews, cannot be applied here. It is no measuring rod.

No comparison can be made between a congregation of laymen and a congregation of missionaries. The fact that a group of carpenters get together and elect a chairman to preside over them does not keep the chairman from still being a carpenter. That a group of ministers and missionaries gather in a congress or college, and appoint a presiding officer, does not prevent the minister thus elected to the special office from being a minister. So it is with appellant.

Jehovah's Witnesses are a society of evangelists, missionaries and ministers. It is not unusual to hear of a society of missionaries or a society of ministers. The Jesuits are known as the Society of Jesus. This is a well-known international Catholic society of ordained priests. Before being a member of that organization one must be a Catholic priest. In various other Catholic societies, such as the Catholic Missionary Society, and the orders of monks of different kinds, the members are confined to ministers, priests and lay brothers. The Baptist Home Missionary Society and other missionary societies of the popular orthodox religious groups have membership confined to ordained ministers. No one can become a member of such societies unless he is ordained and engaged in the field missionary work.

In all such societies they do not have the clergy and

laity distinction. Such groups, when they assemble, gather as a congress of ministers. The congregation of Jehovah's Witnesses at Chino assisted by appellant assemble in the same manner. The fact that they were all ministers did not prevent appellant from being a minister of the gospel.

The undisputed evidence shows that appellant spoke from the pulpit or platform in the congregation. This was another part-time job for him. He preached to the congregation. He used the Bible as the source of his guidance of the congregation in public worship. The fact that the audience that he spoke to were ministers instead of laymen did not in any sense of the word change the nature of his work.

It is agreed that the office of congregation servant or presiding minister *alone* (a part-time job, not full-time) did not entitle appellant to be classified as a minister of religion. Had the duties of the presiding minister required all of his time to the work, then there would be no doubt that he would be entitled to the exemption. His duties were not confined to the performance of the part-time office as presiding minister. He had a full-time job as a pioneer. It was this full-time missionary work that he was performing in the field that entitled him to the classification.

The duties of the presiding minister of the congregation, which he performed, actually buttressed his vocation and claim for exemption based on his full-time missionary work. It supported his ministry. It made the claim stronger. He showed more than the law required for exemption. His job as presiding minister was a performance of another, second, religious office. It was in addition to his work as a pioneer, which was his vocation. By law it made him exempt regardless of his position as presiding minister.

It is respectfully submitted that appellant is exempt as a minister by reason of his full-time pioneer missionary activity (regardless of performance of duties as presiding minister of the congregation). The part-time presiding-minister work merely augments his claim for exemption as a full-time minister.

D.

Nothing said by the Government about the status of appellant as a full-time pioneer minister prevents his classification as a minister of religion based alone on that activity.

The act and the regulations, as has been shown, have no orthodox limitations. They provide for a general exemption that protects all full-time ministers of all religious organizations. It was not intended by Congress to limit the exemption to only the minister who acted as the full-time presiding minister of a congregation of laymen meeting in a building. As has been shown, it extends to all who pursue their ministry as their vocation, regardless of the duties they perform in their particular religion.

The courts have construed the law to protect the full-time pioneer missionary of Jehovah's Witnesses, even when he does not act as the presiding minister of a congregation. —*Hull* v. *Stalter,* 151 F. 2d 633 (7th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Burnett,* United States District Court for the Western District of Missouri, September 1, 1953, 115 F. Supp. 141.

Whatever uncertainty existed in the 1940 Act about the amount of time required to be devoted to the ministry (see *Cox* v. *United States,* 322 U. S. 442) was removed when the 1948 Act was passed. The new statute required that before a registrant could successfully claim exemption as a minister of religion he would have to show that he pursued his ministry as his vocation.

The present act when properly interpreted exempts appellant. The undisputed evidence shows he has pursued the full-time pioneer field missionary work as a minister of religion. It is undeniably his vocation. His position in the organization as a pioneer makes him one of the leaders. He is a leader because the ministry of Jehovah's Witnesses is his vocation.

His position as presiding minister of the congregation

makes him a special leader of others of Jehovah's Witnesses. This alone does not entitle him to the exemption because his duties in that office are not his vocation. He contends that his leadership before and among the congregation located among the homes of the people within the boundary of his missionary territory makes him exempt. It is in these homes that he has a congregation of laymen. They depend upon him for spiritual guidance. He is their leader.

A religious congregation is not necessarily confined to members who meet in a cathedral or in another church edifice. It is true that those who gather in such places are a congregation of religious people. These may not all be members of the church presided over by the minister. A careful study of history of religion heretofore reviewed (*supra* at pages shows that a congregation of an itinerant evangelist and peripatetic minister may be—and often is —found either on the streets or in the homes of the people.

Appellant, according to the testimony and the papers in his draft board file, is this type of a primitive minister. He, like the apostle Paul, 'teaches publicly on the streets,' and also in the homes of the people. (Acts 20:20; Luke 22:24-27) Dickinson in his territory, as did Christ Jesus, went around "about the villages, teaching" and 'preaching the gospel of the kingdom.'—Mark 6:6; Matthew 9:35; Luke 8:1.

Appellant followed the advice of Peter which is to preach primitively like Jesus. Peter said: "For even hereunto were ye called: because Christ also suffered for us, leaving us an example, that ye should follow his steps." (1 Peter 2:21) Jesus told all of his primitive followers to go from house to house: "And as ye go, preach, saying, The kingdom of heaven is at hand." (Matthew 10:7, 10-14) James emphasized the duty of a Christian evangelist: " . . . to visit the fatherless and widows in their affliction." (James 1:27) It was done at their homes.

It is in the homes of the people therefore that the main congregation of appellant is found. He discharges the re-

sponsibilty put upon him by the law of God and the governing body of Jehovah's Witnesses as a Christian evangelist and minister, following in the footsteps of Jesus. He answers the need of thousands of people in his vast missionary field. It is well known that a large percentage of the people do not belong to any church. They therefore never go to church. A large percentage of the people, although they are members of a church, do not attend. The only way that these people can be served with spiritual truths, and kept free from the disintegrating influence of ignorance of the Bible and from communism, is by having the gospel preached to them at their homes. This appellant did.

The facts show that, in addition to distributing books containing religious sermons, appellant also answers Bible questions. He also conducts home Bible services as a minister in the residences of the people. Furthermore, he administers to their spiritual needs as their minister. He customarily serves regularly each week the same people in the performance of his missionary preaching.

Even if appellant's activity were confined to the distribution of books in his missionary field, he still would be exempt. The distribution of religious literature in his missionary field may be his major activity. But he also preaches orally in the homes of the people. For the purpose of argument only, let it be conceded that he does nothing but distribute literature as a minister of Jehovah's Witnesses. Still, in accordance with the national policy expressed by the Court and that of the Selective Service System, he would be exempt as a minister.

The ecclesiastical determination of Jehovah's Witnesses is to use literature—written sermons—as a means of preaching the Word, and not confine preaching to oral sermons. That ecclesiastical determination as a proper method of preaching is binding upon this Court. The Government and the draft boards must concede that it is preaching employed by Jehovah's Witnesses. This preaching through the use of literature is unassailable. It is beyond the competency

of the draft boards or the courts to encroach upon the ecclesiastical determination made by the governing body of Jehovah's Witnesses. This method must be considered to be religious preaching, the same as preaching from the pulpits. This was so held in *Murdock* v. *Pennsylvania,* 319 U. S. 105, 109.

The religious book colporteurs of the Seventh-day Adventist group have been declared to be exempt under the 1940 Act as ministers of religion. While this group are not ministers in the sacerdotal sense or ordained as are Jehovah's Witnesses, they are ministers of religion within the meaning of the act. A predetermination of their ministerial status was made by General Lewis B. Hershey in his *State Director Advice 213-B,* June 7, 1944, Selective Service System, Washington, D. C. He said that they are ministers "even though they are not ordained." When each is "found to be actually engaged in a bona fide manner in full-time work of this nature and files evidence of possession of a colporteur's license or a colporteur's credentials," he is entitled to the exemption. The Seventh-day Adventist colporteurs are mere "Gospel workers." Their qualifications are claimed to be equal in standing, however, with those who preach the gospel.—White, *The Colporteur Evangelist,* Mountain View, California, 1930.

The Director of Selective Service has declared Jehovah's Witnesses to be entitled to the ministers' classification. In *Selective Service in Wartime* (Second Report of the Director of Selective Service 1941-42), Washington, Government Printing Office, 1943, he said that the ministerial exemption extended to "the Jehovah's Witnesses, who sell their religious books, and thus extend the Word." (P. 241) The Director said in this same report that all that is required of the minister of religion claiming the exemption is that he show that he has "dedicated himself to his task to the extent that his time and energies are devoted to it to the substantial exclusion of other activities and interests."—*Selective Service in Wartime,* p. 241.

Appellant's former background and schooling for the ministry cannot be questioned. This also is armored completely by an ecclesiastical determination of Jehovah's Witnesses that was binding upon the draft board. It is conclusive. It can be questioned neither by the Government nor by the courts.

Congress did not intend that a minister have his background questioned. Senator Tom Connally specifically rejected such efforts when this act was brought before Congress. He said:

> "Mr. President, when I was a boy none of the preachers whom I ever heard preach could have taken the benefit of that exemption. . . . Many good old cornfield preachers who gathered their flocks around an open Bible on Sunday morning or gathered their flocks in camp meeting in the summertime, and got more converts during those two weeks than they got all the year, because next year they would get all those converts over again and then some new ones, never saw a divinity school. They never were in a seminary; but they walked with their God out yonder amidst the forests and plains; they read His book at night by kerosene lamp or tallow candle."—86 Cong. Rec. 10589-10590.

See also *Niznik* v. *United States,* 184 F. 2d 972 (6th Cir.).

Appellant showed that he had satisfactorily pursued the course of study prescribed by the Watchtower Bible and Tract Society. He completed his training as a minister. The organization found that he was fit and qualified to become (1) a regular minister, and (2) an ordained minister. This determination was an ecclesiastical determination. It is not subject to review before the draft boards or in the courts.

While it was not required that he go to a theological school or attend a divinity college, he did attend the Watch-

tower Theocratic Ministry School conducted at his congregation. He showed that he had a knowledge of the Bible. He was apt to teach and preach. He knew sufficient of the doctrines of Jehovah's Witnesses. The ecclesiastical determination as to what schooling qualified him to become a minister of Jehovah's Witnesses is not subject to criticism by the Government, the draft board or the courts.

It has many times been determined that the question and the propriety of the ordination of a minister of religion is not for the government or any agent thereof to question. If it is sufficient to the religious organization, it is satisfactory to the law. The adequacy of appellant's ordination is binding on the Government. The ecclesiastical determination of Jehovah's Witnesses that baptism is their ceremony or method of ordination cannot in any way be questioned or disputed by the court below or by the Government.

Appellant described to the local board that the ordination ceremony was that of baptism. He said it was the organizational method of Jehovah's Witnesses to ordain.

The Director of Selective Service declared that while ordination in many of the large orthodox denominations is accompanied by elaborate ceremonies, in many other organizations, including the dissentients and unorthodox groups, "it is the simplest of ceremonies or acts without any preliminary serious or prolonged theological training. The determinations of this status by the Selective Service System have been generous in the extreme."—*Selective Service in Wartime* (Second Report of the Director of Selective Service 1941-42), p. 240, Washington, Government Printing Office, 1943.

The submission to the ordination ceremony of public immersion in water branded appellant as a duly ordained minister of Jehovah's Witnesses. It marked him as a person who dedicated his life to the service of Jehovah God as a minister. It bound him to preach the gospel of God's kingdom as long as he lives. His ordination carries the accept-

ance of obligations which it imposes. There is entered into a complete, unbreakable agreement on the part of the minister thus ordained to follow in the footsteps of Christ Jesus. The one ordained cannot abandon his covenant to preach, for any reason. The covenant requires faithfulness—even to the point of death. An ordained minister of Jehovah God cannot retire or quit preaching without violating his covenant. Turning back from preaching results in his everlasting death. God declares that covenant-breakers "are worthy of death."—Acts 3:23; Romans 1:31, 32.

The ordination of Jehovah's Witnesses emanates from the Most High God "whose name alone is JEHOVAH." (Psalm 83:18; Isaiah 61:1-3) He is the source of all authority. Jehovah is the One who authorizes his witnesses and ordains his ministers. He has fixed the ordination ceremony used by Jehovah's Witnesses. Their ordination is identical to the ordination ceremony Christ Jesus underwent. A very simple ceremony marked the beginning of his ministry. He was merely baptized in the river Jordan. (Matthew 3:13-17) That was it. It is this same simple ordination ceremony every one of Jehovah's Witnesses goes through. By this he dedicates himself to preach. It is his ordination.

The courts cannot question the formal ordination of Jehovah's Witnesses through the use of the ceremony of water baptism. Yet even if the courts were to make a fair review of the history of the Christian church it would show that this was the ordination ceremony of all ministers of the early church. It has been shown that this was the ordination ceremony of the Lord Jesus and his apostles.—See the paragraph above.

Secular references will establish that this same ordination ceremony was pursued by the Christian church following the death of the Lord Jesus and the apostles.

Doctor Charles Hase, celebrated German historian, in his book *History of the Christian Church,* pp. 40, 41, New York, Appleton and Co., 1855, says of the early church:

> "Everyone who had the power and the inclination to speak in public was allowed to do so with freedom. Baptism as an initiatory rite was performed simply in the name of Jesus."

The same ordination ceremony or baptism as the sole rite preparatory to the ministry or preceding was declared by the great theologian, Martin Luther. In the book, *The Age of the Reformation,* by Professor P. Smith, page 71, London, Cape, 1920, it is stated:

> "Luther demolishes these walls with words of vast import. First, he denies any distinction between the spiritual and temporal estates. Every baptized Christian, he asserts, is a priest, and in this saying he struck a mortal blow at the great hierarchy of privilege and theocratic tyranny built up by the Middle Ages."

These historical references and others clearly demonstrate that the basic ceremony of ordination for the true Christian minister is that now used by Jehovah's Witnesses. It is that of baptism alone. Jehovah's Witnesses therefore are not importing new meaning to the word "ordination." Jehovah's Witnesses are actually getting back to the basic principles of the early Christian church in the matter of ordination. Their ordination ceremony is unadorned by the additions made by ecclesiasticism of modern times. It is ancient. It is not novel or special.

The assault by the Government against the ordination of appellant defies the fundamental principle of the Supreme Court of finality of ecclesiastical determinations. It also contradicts history of religion and the general law of the land. This is expressed in many decisions saying what constitutes an ordained minister. It has been held that the law "has no regard to any particular form of administering the rite or any special form of ceremony."

> "It has been the practice of this court, there-

> fore, to grant the license to authorize the solemnization of marriages to duly commissioned officers in the Salvation Army who are engaged under such authority in ministering in religious affairs; to all Protestant ministers, Catholic priests, Jewish rabbis, teachers and ministers of spiritualistic philosophy, and in fact all persons who can prove to the satisfaction of the court that they have been duly appointed or recognized in the manner required by the regulations of their respective denominations, and are devoting themselves generally to the work of officiating and ministering in the religious interest and affairs of such societies or bodies."—In re *Reinhart,* 9 Ohio, Dec. 441, 445.

The British courts have also given the same broad and liberal interpretation to the term "ordained minister." In a case involving the ministry exemption under the draft law of Canada Mr. Justice McLean of the Supreme Court of Saskatchewan in the case of *Bien* v. *Cooke,* 1 W. W. R. (1944) 237, said:

> "Although the whole congregation is very indefinite considered from a secular point of view and they appear to be without any prescribed procedure in the matter of ordaining the minister, yet various denominations use various forms of ordination and if the procedure is satisfactory to the congregation, as appears to be in this instance, that should be considered sufficient form of ordination."

That a draft board can reject the claim of a minister because of his youthfulness is arbitrary and capricious. It cuts the ground out from under history itself. It nullifies completely the intent of Congress. Surely if Congress intended to disqualify young ministers or to place an age limit on ministers of religion it would have said so. If the Presi-

dent desired to make youthfulness an element of disqualification he could have very easily done so in the regulations. Since neither the act nor the regulations provide for the forfeiture of the exemption because of youthfulness, it is beyond the authority of the courts to so amend the act and regulations. The judges cannot read into the act this alien doctrine.

If youthfulness were an element, Congress would have made no provision for the ministerial exemption. The age limit of the draft law is from 18 to 26. If a young man under 21 or not over 26 is not qualified to be a minister, then Congress did not know what it was doing. It provided for the ministerial exemption of men as young as 18 and not older than 26. The very fact that there is duty imposed on a man between 18 and 26 under the act carries with it the correlative right of an exemption to a man between 18 and 26. If young ministers are not exempt then where will religion be when the old ministers die? Such a holding would be against the public welfare and the history of religion.

Preaching at an early age is not unusual to followers of Christ. (Deuteronomy 6:4-7; Ephesians 6:1-4; Ecclesiastes 12:1; Psalm 71:17; Genesis 18:19) The ministry is not confined to adult persons or to the aged. Youths not only are permitted to preach, but are invited to do so. (Joel 2:28, 29; Psalm 148:12, 13) Ancient outstanding examples are Samuel, Jeremiah and Timothy, whose faithfulness as Jehovah's Witnesses in early youth is proof that it is proper for young men to act as ministers. (1 Samuel 1:24; 2:11; 3:1; Jeremiah 1:4-7) Paul the apostle declares that he sent Timothy forth as a minister. (1 Corinthians 4:17) Timothy was instructed by Paul to let none despise his youthfulness.—1 Timothy 4:12.

Christ Jesus, when but twelve years of age, was already about his "Father's business," discussing the Scriptures. (Luke 2:46-49) When preaching the gospel later on, he said: "Suffer little children to come unto me, and forbid them not: for of such is the kingdom of God."—Luke 18:16;

see also Matthew 18: 1-6; Psalm 148: 12, 13; Proverbs 8: 32.

History concerning the popes, archbishops and bishops of the Catholic Church and the clergymen of the orthodox Protestant denominations reflects that many ministers began their ministry at the age of 12 and upward.

John Calvin, the sixteenth century reformer and head and founder of the Calvinistic school of theology, was a chaplain at the age of 12 years. He was at that time a priest in the Roman Catholic Church. Calvin was born in 1509. Concerning him the *Encyclopædia Britannica,* Vol. 4, edition of 1892, says:

> "In his thirteenth year his father, whose circumstances were not affluent, procured for him from the bishop the office of chaplain in the Chapelle de Notre Dame de la Gesine. A few days after his appointment he received the tonsure and on the 29th of May 1521, he was installed in his office."

Centuries earlier, Benedict IX was installed as pope at the age of 12 and continued in office from 1033 to 1056.

Life magazine carried an article entitled "A 17-Year-Old Minister" in its March 9, 1953, issue. The article reads:

> "Lasserre Bradley, Jr., who had always felt that he had a calling to be a minister, preached his first sermon at the age of 13 in a small Baptist church near his home in Lexington, Ky. The congregation was amazed and delighted by the sermon, which was entitled 'Prepare to Meet Thy God.' At 15 Lasserre organized a congregation in a backwoods community in Kentucky, and the next year his congregation asked Lasserre's home church to ordain their young leader. He was brought before a panel of some 20 ministers who, knowing that their action might be held up to ridicule, made their questions harder than usual.

Lasserre had never studied theology formally but he answered questions about the Bible and Baptist doctrine without a flaw and was promptly ordained.

"Today, the Rev. Mr. Bradley, only 17 and still in high school, is pastor of the large New Testament Baptist church in Cincinnati. He drives there each week end to preach, baptize and conduct funerals and weddings. On Friday afternoons, after finishing school, Lasserre jumps into a car given him by an auto dealer and drives 97 miles to Cincinnati. Over the week end he eats and sleeps in the homes of members of his congregation, getting up early Monday to be back home in time for school. His congregation, an independent Baptist group, was hesitant at first about taking on so young a minister. But under his leadership membership has jumped from 480 to 530, and the congregation, which used to rent quarters, has completed negotiations for buying an old theater for $110,000 to be its church. Lasserre, who graduates from high school in June, plans to continue as pastor while going to college."—Pp. 119-122.

It is respectfully submitted that the undisputed evidence showed that appellant—(1) was a representative of a duly recognized bona fide religious organization, (2) preached the doctrines of Jehovah's Witnesses as an ordained minister, (3) devoted his full time to preaching, which excluded full-time secular work, and (4) had the ministry *as his vocation.* Since the record showed that his proof was not disputed, he should have been classified as a minister of religion and exempted from training and service. Denial of exemption was arbitrary and capricious. The classification was therefore without basis in fact.

CONCLUSION

WHEREFORE the appellant prays that the judgment of the court below be reversed by a judgment of this Court declaring the draft board order to be void and directing the trial court to acquit the appellant and dismiss the indictment.

Respectfully submitted,

HAROLD SHIRE

208 South Beverly Drive
Beverly Hills, California

HAYDEN C. COVINGTON

124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

December, 1953.

No. 14,072.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,
MANLEY J. BOWLER,
Assistant United States Attorney,
Chief, Criminal Division,
MANUEL L. REAL,
Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for United States of America, Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 14,072.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

Statement of Jurisdiction.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on May 20, 1953, under Section 462 of Title 50, App., United States Code, for refusing to submit to induction into the armed forces of the United States. [R.[1] pp. 3-4.]

On June 1, 1953, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on July 28, 1953.

On August 4, 1953, trial was begun in the United States District Court for the Southern District of California by the Honorable Dave Ling, without a jury, and

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[1]"R." refers to Transcript of Record.

on August 26, 1953, the appellant was found guilty as charged in the indictment. [R. pp. 11-12.]

On September 8, 1953, appellant was sentenced to imprisonment for a period of two years and judgment was also entered. [R. pp. 16-17.] Appellant appeals from this judgment. [R. pp. 17-18.]

The District Court had jurisdiction of this cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code.

This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.

Statutes Involved.

The indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides, in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.

Statement of the Case.

The indictment charges as follows:

> "Indictment
>
> [U. S. C., Title 50, App., Section 462—Selective Service Act, 1948.]
>
> The Grand Jury charges:
>
> Defendant JOHN HENRY HACKER, a male person within the class made subject to selective service under the Selective Service Act of 1948, registered as required by said Act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 130, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the Armed Forces of the United States of America on January 14, 1953, in Los Angeles County, California, in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [R. pp. 3-4.]

On June 1, 1953, appellant appeared for arraignment and plea, represented by Harold R. Shire, Esq., before the Honorable William M. Byrne, United States District Judge, and entered a plea of not guilty to the offense charged in the indictment.

On July 28, 1953, the case was called for trial before the Honorable Dave Ling, United States District Judge, without a jury, and on August 26, 1953, the appellant was found guilty as charged in the indictment. [R. pp. 11-12.]

On September 8, 1953, appellant was sentenced to imprisonment for a period of two years in a penitentiary. [R. p. 15.]

Appellant assigns as error the judgment of conviction on the following grounds:

A. The District Court erred in failing to grant the Motion for Judgment of Acquittal duly made at the close of all the evidence. (App. Spec. of Error 1—App. Br. p. 9.)[2]

B. The District Court erred in convicting the appellant and entering a judgment of guilt against him. (App. Spec. of Error 2—App. Br. p. 9.)

C. The District Court erred in denying the Motion for New Trial. (App. Spec. of Error 3—App. Br. p. 9.)

IV.
Statement of the Facts.

On June 3, 1951, John Henry Hacker registered under the Selective Service System with Local Board No. 130, San Bernardino, California. [F. 1-2.][3]

On February 1, 1952, John Henry Hacker filed with the Local Board No. 130, SSS Form No. 100, Classification

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[2]"App. Spec. of Error" refers to "Appellant's Specification of Error;" "App. Br." refers to "Appellant's Brief."

[3]Numbers preceded by "F" appearing herein within brackets refer to pages of Appellant's Draft Board File, Government's Exhibit No. 1. The pages are numbered in longhand at the bottom of the photostatic copies which identifies the page in the Draft Board file.

Questionnaire [F. 8-15.] He failed to indicate his conscientious objections to war, if any, by not signing Series XIV—Conscientious Objection to War. [F. 14.]

On February 25, 1952, John Henry Hacker was classified in Class 1-A by Local Board 130 and was mailed SSS Form 110, Notice of Classification on February 28, 1952. [F. 15.]

On March 5, 1952, the appellant requested a personal appearance before the Local Board. [F. 30.] On March 20, 1952, the appellant appeared before the Local Board in person to inquire why he had been classified in Class 1-A. The Local Board heard the appellant and considered his claim as a minister. [F. 34-35.]

On April 21, 1952, the Local Board continued the appellant in Class 1-A and mailed notice thereof to the appellant. [F. 15.]

On April 29, 1952, the appellant filed an appeal of this classification. [F. 15, 41.] On May 20, 1952, SSS Form 150, Special Form for Conscientious Objector, was mailed to the appellant at the request of Captain Sanders, Coordinator of District No. 6. The Special Form for Conscientious Objector, SSS Form 150, was returned unsigned and unexecuted by the appellant. [F. 15, 42-46.]

On July 17, 1952, the Appeal Board classified the appellant in Class 1-A, and notice thereof was mailed to the appellant. [F. 15, 47, 51.]

On January 2, 1953, the appellant was ordered to Report for Induction on January 14, 1953. [F. 15, 58.]

On January 14, 1953, the appellant reported for induction as previously ordered, but refused to submit to induction into the Armed Forces of the United States. [F. 60.]

V.

ARGUMENT.

The Denial of the Ministerial Exemption by the Appeal Board to the Appellant Was With Basis in Fact and the Classification Given to the Appellant Is Neither Arbitrary nor Capricious.

There is no constitutional right to exemption from military service because of conscientious objection or religious calling. In *Richter v. United States,* 181 F. 2d 591 (9th Cir.), this Court said:

> "Congress can call everyone to the colors, and immunity from military service arises solely through congressional grace in pursuance of traditional American policy of deference to conscientious objection, and there is no constitutional right to exemption because of conscientious objection or religious calling or conviction or activities."

Accord,

Tyrrell v. United States, 200 F. 2d 8 (9th Cir.).

Congress has granted exemption and deferment from military service only to those who qualify under the procedure set up by Congress to determine classification—the Selective Service System. This procedure is administrative even though one may be criminally prosecuted for failure to comply with the orders of the Selective Service System.

Falbo v. United States, 320 U. S. 549;

Williams v. United States, 203 F. 2d 85 (9th Cir.).

The duty to classify, to grant or deny exemptions rests upon the draft boards, local and appellate. The burden is

upon a registrant to establish his eligibility for deferment, or exemption, to the satisfaction of the local board.

United States v. Schoebel, 201 F. 2d 31 (7th Cir.);
Davis v. United States, 203 F. 2d 853 (8th Cir.).

Each registrant is considered to be available for military service.

32 C. F. R., Sec. 1622.1(c);
United States v. Schoebel, supra.

Every registrant who has failed to establish to the satisfaction of the local board that he is eligible for classification in another class is placed in Class 1-A.

32 C. F. R., Sec. 1622.10.

The local board carefully considered the claim of the appellant for a minister's exemption, Class 4-D, at a meeting of the local board. [F. 35.] The Appeal Board considered this claim also [F. 31], and both boards rejected it based on the information they had on hand.

The classification of the local board, and thereafter of the Appeal Board is final. The United States Supreme Court in *Estep v. United States,* 327 U. S. 114 at pages 122-133, stated in this regard:

> ". . . The provision making the decision of the Local Board's 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judiciary review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the

local board is reached only if there is no basis in fact for the classification which it gave the registrant."

Accord:

Martin v. United States, 190 F. 2d 775 (4th Cir.), *cert. den.* 342 U. S. 872.

In a recent case, *Dickinson v. United States,* 22 L. W. 4026, the United States Supreme Court held that under the facts presented where the appellant engaged in secular work on a part-time basis, five hours a week as a radio repairman, this would not preclude him from the ministerial exemption of Class IV-D. On the other hand, if a registrant were to be employed on a full-time basis in secular activity, it is probable that his ministerial activities would be incidental in nature so that clearly he would not be entitled to a ministerial Class IV-D exemption.

In this case, the facts do not show clearly that either endeavor carried on by the appellant is incidental to the other. The appellant could rightly have said that he is *the bus driver* for the Chino School District [F. 11-12], for he is in charge of a bus driving children to and from the school, and thus, he may claim it as his main occupation. The appellant asserted to the Local Board that he was a full-time minister. [F. 30.] Thus, there is a question of fact for the Local Board and later the Appeal Board to decide. The Appellee contends that as to this question of fact, the Local Board's and later the Appeal Board's decision should govern in concurrence with *Estep v. United States, supra,* and thus be final.

VI.
Conclusion.

The appellant's job is to convince the local Selective Service Board of his right to a ministerial exemption. If he fails he may pursue his right of administrative appeal. The power to classify rests solely in the Selective Service System. Their decision made in conformity with the regulations is final even though erroneous if there is in fact a basis for such classification. It is submitted that such basis is herein present.

An Order to Report for Induction, based upon such a valid classification, imposes a duty upon the registrant to submit to induction, and the violation by refusal to submit to induction renders the registrant subject to criminal penalties.

No action of the Local or Appellate Board was arbitrary or capricious.

There was no error in the ruling of the trial court in refusing to grant the motion for judgment of acquittal at the close of the evidence.

There was no error of law in the ruling of the trial court, and therefore, the conviction should be affirmed.

We therefore respectfully submit that the judgment of conviction should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,
MANLEY J. BOWLER,
Assistant United States Attorney,
Chief, Criminal Division,
MANUEL L. REAL,
Assistant United States Attorney,
Attorneys for United States of America, Appellee.

No. 14072

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JOHN HENRY HACKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

HAROLD SHIRE
208 South Beverly Drive
Beverly Hills, California

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

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JOHN HENRY HACKER,

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vs.

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REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

May It Please the Court:

This is appellant's reply to the brief of appellee. Rather than repeat here the information appearing in the reply brief in the companion case of *Clair Laverne White* v. *United States of America,* No. 13893, filed in this Court, references will be made to that brief.

I.

The appellee argues, at pages 6 and 7 of its brief, that

it is the duty of the boards to classify and the burden rests on the registrant to establish eligibility therefor, to the satisfaction of the board. Appellant does not contest that fact. But appellant says that if the board does not act in accordance with the definition contained in the act but goes outside the law to classify, the appellant is not obliged to satisfy the board. Even if the registrant does not satisfy the board that he is entitled to the classification claimed, the classification given may be upset if there is no basis in fact for the denial of the exemption. See the answer to this argument given under Point III of reply brief filed by Clair Laverne White, No. 13893.

II.

The appellee stated, at page 7 of its brief, that the appeal board rejected the claim for classification because of "the information it had on hand." The appeal board did not have any information on hand that contradicted in any way the undisputed evidence showing that Hacker pursued the ministry as his vocation. There was no basis in fact for the denial by the appeal board of the exemption. —*Annett* v. *United States,* 205 F. 2d 689 (10th Cir. June 26, 1953); *United States* v. *Pekarski,* 207 F. 2d 930 (2d Cir. Oct. 23, 1953); *Dickinson* v. *United States,* 346 U. S. 389, 74 S. Ct. 152; *Schuman* v. *United States,* — F. 2d — (9th Cir. Dec. 21, 1953); *Bejelis* v. *United States,* 206 F. 2d 354 (6th Cir. July 20, 1953); *Jewell* v. *United States,* — F. 2d — (6th Cir. Dec. 22, 1953); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky. 1952); *United States* v. *Alvies,* 112 F. Supp. 618 (N. D. Cal. S. D. 1953).

III.

The appellee argues, at page 8 of its brief, that the *Dickinson* case (346 U. S. 389, 74 S. Ct. 152) is limited to the particular facts of that case. The facts in the *Dickinson* case cannot be distinguished from the facts in this case. The evidence shows that Hacker was pursuing the ministry

as his vocation. It cannot rightly be said that he is a mere bus driver. Even if Hacker devoted more than half of his time to the ministry, under the *Dickinson* case he would still be entitled to classification as a minister. Hacker here, however, devoted only a small part of his time to the business of driving the Chino school bus. When the time feature is applied to his secular activity it becomes apparent that his driving a bus is entirely incidental to the performance of his duties as a full-time minister of the gospel.

Since the undisputed evidence shows that the ministry was his vocation, it must be held that the rule of the *Dickinson* case applies here, as does also the holding by this Court in *Schuman* v. *United States, supra.*

CONCLUSION

It is submitted that the judgment of the court below should be reversed and the appellant ordered acquitted.

Respectfully,

Harold Shire
208 South Beverly Drive
Beverly Hills, California

Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

No. 14073

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

R. H. OSBRINK, M. E. OSBRINK, AND BERTON W. BEALS AS TRUSTEE, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF R. H. OSBRINK MANUFACTURING COMPANY, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
ARNOLD ORDMAN,
MARGARET M. FARMER,
Attorneys,
National Labor Relations Board.

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R. H. OSBRINK, M. E. OSBRINK, AND BERTON W. BEALS AS TRUSTEE, COPARTNERS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF R. H. OSBRINK MANUFACTURING COMPANY, RESPONDENTS

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order and supplemental order (R. 80–84, 104–105) issued against respondents on April 13, 1953, and July 7, 1953, respectively pursuant to Section 10 (e) of the National Labor Relations Board, as amended (61 Stat. 136, 29 U. S. C. Supp. V, Section 151, *et seq.*)[1] This Court has jurisdiction under Section 10 (e) of the Act because the unfair labor practices in question

[1] The pertinent provisions of the Act are set out in the Appendix, *infra*, pp. 39–41. The order of the Board is printed in 104 N. L. R. B. No. 1.

occurred at Los Angeles, California, within this judicial circuit.[2]

I. Statement of facts

Following the customary proceedings under Section 10 of the Act, the Board found (R. 76–77, 47, 55), in agreement with the Trial Examiner, that respondents had discharged 2 employees because of their activity in behalf of the Union[3] in violation of Section 8 (a) (3) and (1) of the Act, and had restrained, coerced, and interfered with their employees in violation of Section 8 (a) (1) of the Act by certain statements made to the employees by R. H. Osbrink, a copartner and by two of respondents' supervisory employees.[4]

[2] Respondents are a copartnership engaged in the manufacture of aluminum and magnesium castings. The copartnership maintains its principal place of business at Los Angeles, California. During the 12-month period preceding issuance of the complaint, it caused products manufactured by it of a value in excess of $25,000 to be sold and transported from its place of business in Los Angeles to points outside the State of California (R. 15). Respondents concede that they are subject to the jurisdiction of the Board (R. 16, 19).

[3] International Union, United, Automobile Aircraft & Agricultural Implement Workers of America, CIO.

[4] After the issuance of the Board's decision and order, respondents filed a "Motion for Reconsideration, Motion for Rehearing and Motion to Dismiss" (R. 85) before the Board, alleging, *inter alia*, *that* the Board proceedings were invalid (1) because the charges which initiated the proceeding had been filed by UAW–CIO, Region 6, and that said Region 6 was not in compliance with the filing requirements of Section 9 (f), (g), and (h) of the Act; and (2) because certain allegations in the complaint, not specifically adverted to in the charges, were barred by the 6-month limitations provision of Section 10 (b). The Board, in a Supplemental Decision and Order (R. 100), denied respondents' motions, holding (1) that Region 6 was not a separate labor organi-

The instant case was consolidated for the purpose of hearing with a hearing ordered by the Board upon Objections filed by the Union to the conduct of respondents in connection with an election held by the Board among respondents' employees on January 25, 1952. The Board, in agreement with the Trial Examiner, found that respondents' conduct preceding the election had failed to meet the standards required by the Board and adopted the recommendations of the Trial Examiner that the election be set aside (R. 76).

The facts upon which the Board predicated these conclusionary findings are summarized below:

A. The Union's organizational campaign and respondents' successful attempts to cause the Union's defeat in the election

The Union began an organizational campaign in respondent's plant in the fall of 1951 and in December of that year petitioned the Board to conduct an election to determine the bargaining representative for respondents' employees (R. 26; 194, 257, 261, 280). On January 2, 1952, the Board directed that an election be held among respondents' production and maintenance employees on January 25, 1952.

Pending the election, respondents took various steps to discourage union activity and to encourage the Union's defeat in the election. On January 15, re-

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zation but merely an administrative arm or subdivision of the UAW-CIO, and hence not required to comply with Section 9 (f), (g), and (h); and (2) that the allegations in questions were properly included in the complaint. In order to avoid any further ambiguity on the compliance issue, the Board amended its original decision and order to delete the words "Region 6" wherever they appeared therein. These matters will be discussed further below (pp. 28–38).

spondents discharged employee John LeFlore, Jr., the most active proponent of the Union in the plant, under circumstances which will be discussed more fully below. About a week before the election, Derry Smith, whom the Board found to be a supervisory employee in charge of the shake-out department (R. 34–36, 76), called a shake-out crew away from their work, bade them gather around him, and informed them that respondent R. H. Osbrink had told him that the plant would be closed if the Union won the election (R. 35; 224–225, 227–228, 243–244, 252, 265–266). Shortly thereafter, Smith warned Goynes, an employee working under his direction, that Osbrink would take away certain privileges then enjoyed by the employees if the Union won the election (R. 36; 244). After LeFlore's discharge on January 15, both Smith and Watkins, who was an assistant to foundry superintendent Rasp (R. 459, 285), told employees that LeFlore had been discharged because of his union activity (R. 45–46; 240–241, 251). Smith also told Goynes that Goynes, too, had been slated for discharge because of his union activity and intimated that Goynes had been saved only because Smith had intervened in his behalf (R. 241, 251). Smith also told a group gathered at LeFlore's home that LeFlore would never be rehired because he had been seen passing out Union pamphlets (R. 46; 293–294).

On the afternoon of January 24, 1952, the day before the election, Osbrink assembled the employees during working hours and spoke to them concerning the coming election (R. 27–28; 141–158). Most of his remarks were addressed to the history of the plant and to the

opportunities for training and advancement which were open to his employees. He stated that his success had been achieved by open shop methods, and that he did not need and did not want the Union (R. 29; 160, 143–144). He stated that he had started the business in the midst of the depression and that if the Union had been interested in the employees, they should have been in the plant at that time. He also expressed the opinion that the Union was now interested because of the money it could get every month from respondents' 250 employees. He then told the employees that if they "wanted to spend money for guidance in [their] personal affairs," he was more qualified to guide them than anybody else; and that if they "wanted to spend money on that," he would match dollar for dollar and they could establish a fund for entertainments and picnics and so forth. Finally, Osbrink suggested that the employees could "use the money to a better advantage than having an outsider come in and handle your affairs" specifying that it was "not necessary to get outside help" (R. 29; 144–146, 163). Osbrink then introduced Chuck O'Day, a production man in the plant and a representative of management, who spoke of the disadvantages of union membership and the advantages of working for respondents (R. 51; 146–151). After O'Day had finished speaking Osbrink spoke again, urging the employees to vote against the Union and again offered to match dollar for dollar in a fund established by the employees, stating "that's more to the point, fellows, than paying union dues," and suggesting that "rather

than trying to get someone outside we can form our own little group gathering and take care of our own problems" (R. 29; 151–154, 157). In the course of these remarks, Osbrink added the parenthetical observation, greeted by laughter from the employees, that his attorney had instructed him to be sure to tell the employees that his offer "goes whether the union gets in or not" (R. 29; 157).

The following day the employees voted against union representation by 160 to 100 (R. 26).

B. The Discharges

John LeFlore

John LeFlore, Jr., was employed by respondents in September 1951 as a furnace attendant (R. 39; 270–271). After he had spent approximately 6 weeks on this job, where he worked under the supervision of the journeyman furnace attendant Mose Harris,[5] LeFlore requested and obtained a transfer to the shake-out department, where he worked until January 15, 1952, when he was discharged (R. 39; 272, 297–298). During this period, Derry Smith, his im-

[5] Mose Harris, under whom LeFlore worked, and Detroit Rushing, under whom Plummer worked (see *infra*, p. 12), occupied positions analogous to leadmen and were so called by respondents' employees (R. 311–312, 207, 234, 257, 272). Respondents objected to the term "leadmen" however, and preferred to call them "journeymen," a term which Osbrink testified was used to describe "the best man for a particular job" (R. 33; 166). They were each in charge of several banks of furnaces and, as the oldest men on the job, directed the work of the several furnace attendants who worked with them (R. 33; 132–133, 135–138). They were not of supervisory status and voted with other employees in the election (R. 33–34).

mediate superior,[6] assigned to LeFlore 2 new men, one of whom was Smith's own brother, to break in on the job, telling them that LeFlore was a good worker and could direct them (R. 43; 288, 409–410). Smith told LeFlore during this period, according to LeFlore, whom the Trial Examiner and the Board credited, that if all the employees in the department were as efficient as LeFlore, that Smith would have nothing to worry about (R. 43; 287).

LeFlore was the most vigorous and active advocate for the Union in the plant (R. 44; 197, 240, 262, 282–283, 301–302, 304–305). A few hours after he started work for respondents he asked Mose Harris if the plant was organized (R. 44; 276–277). When he was told that respondents did not like unions, and that the plant was not organized, he promptly announced that he thought unions benefited the employees and believed that every shop should be unionized (*ibid.*) When the Union began an organizing campaign in the fall of 1951, LeFlore became its chief proponent in the plant, wore a union button for several days (R. 282–283, 309–310), and actively assisted the Union by vigorously discussing its merits with all the employees with whom he came into contact, including his superior Smith, who was opposed to it (R. 45; 277–283, 301–302, 316–319), and secured the names and addresses of all who were willing

[6] Derry Smith was in charge of the shake-out department, which numbered between 20 and 30 employees who worked in crews in various locations throughout the foundry (R. 34; 273–275, 298–299). The Board adopted the finding of the Trial Examiner that he was of supervisory status.

for him to furnish it with this information (R. 45; 281–282).

On January 2, 1952, as noted above (*supra,* p. 3), the Board directed that an election be held on January 25, to determine whether or not respondents' employees wished the Union to represent them. On January 15, LeFlore was suddenly discharged without explanation (R. 45; 285). When he requested an explanation from Wally Watkins, Superintendent Rasp's assistant, who had handed him his pay checks and told him he was fired, Watkins informed him that he had merely acted on orders from Rasp (R. 285–286). LeFlore immediately went in search of Rasp but could not find him (R. 286). He then spoke to Osbrink, who denied any knowledge of the discharge and advised him to speak to respondent Berton Beals, the general manager of the plant (R. 46–47; 286). Beals also denied knowledge of the discharge but promised to inquire into the matter and told LeFlore to call him later. Two days later Beals informed LeFlore that LeFlore had been discharged because "he got sand in the molds, because they could not keep track of him on his job, and because his work was unsatisfactory" (R. 47, 20; 486).

Meanwhile, on the day of the discharge, Henry Sandford, a member of LeFlore's shake-out crew, asked Derry Smith why LeFlore had been discharged and Smith replied that he did not know; that LeFlore was a good worker and that he would see Osbrink and try to get him back (R. 46; 260). On the following day Smith told Sandford that he would not try to get LeFlore back because LeFlore had been passing out

Union handbills outside the plant and that he would therefore rather not ask Osbrink to rehire LeFlore as Osbrink was opposed to the Union (R. 46; 263–264). A few days later, Smith told LeFlore and a group gathered at LeFlore's home which included Smith's brother, who was still employed at the plant, that he was sorry about the discharge; that he had done all he could to get LeFlore rehired; but that after it was known that LeFlore had been passing out Union handbills, he could do no more, and that LeFlore would never be taken back (R. 46; 264, 293–294). Ralph Edward Goynes, a member of LeFlore's crew, testified without contradiction that Watkins had told him about a week after the discharge that LeFlore was discharged for talking about the Union (R. 46; 246), and quoted Smith as having said that Watkins had told Smith the same thing (R. 46; 242, 251–252).[7]

In its answer to the complaint, respondents alleged that LeFlore had been discharged because he was "constantly, without permission, wandering through the plant away from his own designated work area without regard and without attending to the duties of his employment, as extremely careless in his work and, moreover, was constantly interrupting molders and fellow foundry helpers to the extent that they protested to the superintendent * * *" (R. 20). In support of this allegation, respondents called Mose Harris, the journeyman under whom LeFlore had

[7] Watkins was not called as a witness although he was in the hearing room (R. 501). Smith, although questioned in respect to other matters, was not questioned in respect to the above statements which stand uncontradicted on the record.

worked for the first 6 weeks of his employment, Christensen, a molder with whom LeFlore had worked for about 3 weeks before Christmas 1951 (R. 40; 420, 426), Titus, an employee in the cleanup department, Derry Smith, in charge of LeFlore's shake-out crew, and assistant superintendent Rasp.

Harris testified that LeFlore was away from his post "about half the time" (R. 40; 442), that he had had to get a substitute for him "three or four times a day" (R. 40; 443) and that he had requested Clary Tarrant (assistant superintendent of the plant at that time) to remove him from the department (R. 40; 443–444, 449).[8] Rasp testified that he had transferred LeFlore in an attempt to "snap him out of it" (R. 43; 353). However, Rasp later admitted that LeFlore was transferred at his own request (R. 43; 353). Rasp testified that a molder, Gonzales, had complained about LeFlore (R. 374–375). LeFlore denied that he knew Gonzalez (R. 306–307). Christensen testified that LeFlore was often away from his job when needed, that LeFlore had boasted that he held the record for having stayed in the restroom for a long period of time (R. 41; 421–422), that LeFlore was generally careless in his work, and that he had asked Rasp for a replacement (R. 41; 417). Christensen admitted on cross examination, however, that he had requested that the whole shake-out crew be replaced (R. 42; 424–426); that he, Christensen, was held responsible for good molds (R. 41; 419); that when anything went wrong he always blamed the trouble on

[8] Harris later denied that he had asked for LeFlore's transfer (R. 451).

LeFlore and Goynes (R. 42; 435–437); and that he knew LeFlore's remark as to the restroom had been said in jest (R. 423).

Titus testified that he had seen LeFlore in the pickling department on one or two occasions talking to the pickling employees for 4 or 5 minutes (R. 40–41; 455–456). Both Smith and Rasp testified that they had observed LeFlore's propensity to wander away from his job (R. 43; 353, 355, 406) but were unable to state whether any of this alleged wandering had occurred near the time of his discharge and could assign no particular act on LeFlore's part as the immediate cause of the discharge (R. 43–44; 376–377, 388, 390, 406–407). Rasp could not remember the names of any employees who had broken plant rules except LeFlore and Plummer (R. 379).

LeFlore testified without contradiction that he was constantly being dispatched to various parts of the plant to secure supplies for the molders (R. 295–296, 494–496, 498) and denied that he left his assigned post without authorization or that he did his work carelessly (R. 495–496, 497). Christensen confirmed the fact that LeFlore was sent to various parts of the building for supplies (R. 427–429). Sandford and Goynes, both members of LeFlore's crew, also denied that he wandered away from his job (R. 236–237, 260, 268). Both considered him a good worker (see also testimony of Ricks, R. 211–212).

Archie Plummer

Archie Plummer was employed in June 1951 (R. 47; 311–312). Plummer was a strong advocate of Union

membership and signed an authorization card as soon as the Union began organizing the plant (R. 48; 313–314). He discussed the advantage of Union membership openly in the plant in the presence of Detroit Rushing and Mose Harris, journeyman furnace attendants under whom he worked (R. 48; 322–323, 318–319). Both Rushing and Harris were opposed to the Union (R. 318). Rasp connected Plummer with the Union activity in the plant at the time of the Board election on January 25, 1952, when he attended the counting of the ballots at the end of the election and saw Plummer serving as an observer for the Union (R. 52; 360–362).

About January 20, 1952, Plummer sprained his back, was under a doctor's care and did not report for work again until February 13 (R. 48; 321). On or about February 25, after he had been back at work for approximately a fortnight, he requested and obtained permission from his leadman Walker to be absent for a day because of a heavy cold (R. 49; 319–320). Watkins, Rasp's assistant, was standing 4 or 5 feet away and Plummer thought that he had overhead the request and Walker's assent.[9] When Plummer returned about noon the following day, Watkins asked him for an explanation of his absence and Plummer told him that he had had permission to be absent from Walker. He asked Watkins if he had

[9] As the Trial Examiner pointed out (R. 49, n. 8) Plummer testified that both Walker and Watkins had granted permission for him to be absent (R. 320, 345–347), but Plummer obviously was referring to the fact that Watkins was standing close by and in what he thought was hearing distance when Walker gave his assent (R. 347).

not heard the conversation of the preceding day. At the end of the day, Watkins handed Plummer a check and told him that he was discharged for being off the job without calling in to report his absence (R. 49; 327).

In its discharge notice and in its answer to the complaint (R. 337, 20), respondents alleged that Plummer was discharged because of "absenteeism and tardiness." However, at the hearing Osbrink denied that employees were discharged in respondent's plant for absenteeism or tardiness alone, stating that these were only two factors which were taken into account with other factors in evaluating an employee's work (R. 165–166). His denial was in effect confirmed by the remarks of Chuck O'Day in the speech which he made at the meeting immediately preceding the election in which he stated, in enumerating the advantages of working for respondents:

> Where also is a shop where the worker can show up for work a day or two out of a week and still retain his job? Some men have consistently violated this privilege, but so far not many have received more than a good bawling out and not so good, but a pretty mild one at that. Where else does a man on the job have a softer time than here, and I know, I've worked back there right in the back, right alongside of you, and I didn't feel like working, I didn't have to put out the production and nobody drove me to put it out. And, a man here is never threatened if he did not put out more work * * * (R. 150–151, 165–166).

Respondents' records on absences for the 8-month period from October 1, 1951 to June 30, 1952, introduced into the record, show that many of respondents' employees were repeatedly absent without authorization during this period.[10]

At the hearing respondents introduced evidence to prove that Plummer was lax and unsatisfactory in the discharge of his duties, and amended its complaint at the end of the hearing to allege this as an additional reason for his discharge (R. 51; 492). In this connection respondents called Mose Harris who testified that when Plummer worked with him as a relief man on the shake-out crew (R. 444) several months before the discharge, he sat around on a box instead of performing his duties (R. 51; 444–445, 447–448). Walker testified that Plummer was absent on two or three occasions when it was time to pour and that he had warned Plummer that one of these days he, Plummer was going to lose his job (R. 51–52; 478). Walker, however, had no power to discharge and there is no evidence that he complained to his superior about Plummer's conduct.

Foundry Superintendent Rasp's statements concerning Plummer's discharge are inconsistent and contradictory. At the outset Rasp testified that he had personally authorized the discharge on the ground that

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[10] The records show that Derry Smith had 22 absences of which only 11 were authorized; that Robert Ricks, Jr., had 20 absences, only 5 of which were authorized; and that Wiley Larrimore, Jr., had 32 absences of which only 17 were authorized. As compared with these, Plummer had 27 absences of which 16 were authorized. Respondents admitted that a large percentage of Plummer's absences were caused by his back injury (R. 50, n. 9; 230–231).

"Plummer was wandering through the shop and absenteeism and lax in his duties [sic]" (R. 358), and stated that he had personally warned Plummer concerning his absenteeism (R. 359). Later, Rasp stated that not he, but Clary Tarrant, had discharged Plummer and had told Rasp about it (R. 391). Finally, he stated that Tarrant was not working in the plant at the time of the discharge, and that he could not recall discussing the matter with Tarrant (R. 392–393). In still another version, Rasp testified that respondent Berton Beals, plant superintendent, consulted him about the discharge, but then denied that he had any recollection of such an occurrence when pressed for details (R. 396, 397). Rasp also indicated that at the time of the discharge, he was ignorant of Plummer's role as union observer in the election (R. 53; 361) but later admitted on cross-examination that he had known this fact at that time (R. 53; 362). Indeed, on cross-examination Rasp failed to identify Walker and testified that Walker was "one of those absenteeisms" and was no longer employed by respondents (R. 54, n. 10; 381) although Walker was a key man and was still employed at the time of the hearing (R. 54, n. 10; 476–478). None of respondents' witnesses testified as to the specific dereliction of duty on the part of Plummer at or near the time of his discharge.

II. The Board's conclusions

On the basis of the foregoing facts, the Board, like the Trial Examiner, found that the promises of Osbrink made on the eve of the election that he would give the employees financial benefits as an alternative

to their paying union dues, together with the statements and threats of supervisory employees Smith and Watkins that LeFlore had been discharged and would not be rehired because of his union activities, that employee Goynes almost suffered the same fate, and that Osbrink had threatened to close the plant if the Union won the election, constituted violations of Section 8 (a) (1) of the Act (R. 29–30, 36, 77).[1] The Board found further that the discharges of John LeFlore, Jr., and Archie Plummer constituted violations of Section 8 (a) (3) and (1) of the Act (R. 47, 55, 77).

THE BOARD'S ORDER

The Board's order requires respondents to cease and desist from interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed in the Act; from discouraging membership in the Union or in any other labor organization; from threatening that union representation would result in the closing of the plant and in loss of benefits; and from inducing or seeking to induce their employees to oppose the Union by offering or promising benefits (R. 80–81).

Affirmatively, the Board's order requires respondent: to offer to John LeFlore and Archie Plummer immediate and full reinstatement and to make them

[11] The Board also agreed with the Trial Examiner that this conduct warranted the setting aside of the January 25 election (R. 76–77). In this regard, the record showed that respondents had also acted improperly by withholding the employees' pay checks on the day of the election until after they had voted, although under normal practice, the employees would have been paid immediately upon completing their work (R. 78–79, 37–39; 175–180).

whole for any loss of pay they may have suffered by reason of respondent's discrimination against them; to furnish pertinent data for computing back pay; and to post the customary notices (R. 81–82).

SUMMARY OF ARGUMENT

1. Osbrink's promise in his speech on the eve of the election, of financial help to the employees as an alternative to their payment of union dues, together with the statements of supervisory employees that the factory would be closed if the Union came in and that Plummer had been discharged and would not be rehired because of his union activity were properly found by the Board to constitute violations of Section 8 (a) (1) of the Act.

2. Substantial evidence supports the finding of the Board that LeFlore and Plummer were discharged because of their union activity in violation of Section 8 (a) (3) and (1) of the Act.

3. The Board's findings of an independent violation of Section 8 (a) (1) of the Act in the instant case are not barred by the 6-month time limitation of the proviso of Section 10 (b) of the Act. The proviso restricts the complaint to allegations based upon events occurring not more than 6 months prior to the filing of the charge with the Board. This does not mean, however, that the Board is restricted in its formulation of the issues of the case to matters specifically set forth in the charge. It may include therein allegations of unfair labor practices based upon any activities occurring not more than 6 months prior to the filing of the charge, which were dis-

covered in the course of its investigation of the charge. There is no merit in the contention of respondent that activities mentioned for the first time in the complaint must have occurred within 6 months of the issuance of the complaint. The contention, if accepted, would establish wholly different time limitations for the formulations of issues based upon activities mentioned in the charge and upon related or simultaneously occurring activities which happened to be omitted from the charge either through ignorance or lack of skill on the part of the charging party. Such a restriction is nowhere required by the proviso to Section 10 (b) of the Act and would not effectuate the policies of the Act.

4. The Board was not precluded from proceeding in the instant case with its investigation and its Decision and Order against respondents because "Region 6" of the Union, the name of which appears in the charge, had not complied with the filing requirements of Section 9 (f), (g), and (h) of the Act. "Region 6" is not, as contended by respondent, a labor organization subject to the filing requirements of the statute, but merely a geographical administrative district of the International Union. The filing requirements of Section 9 (f), (g), and (h) were applicable to the International Union, not to its "Region 6," and were fully met. The Director of "Region 6," had, in any event filed an affidavit in compliance with the requirements of the statute in his capacity as an officer of the International.

ARGUMENT

A. The Board properly found that portions of the speech delivered to the employees on the eve of the election together with statements made to the employees by respondents' supervisory employees constituted violations of Section 8 (a) (1) of the Act

The evidence detailed above amply supports the finding of the Board that respondents threatened their employees with reprisals if they joined the Union and promised them benefits if they did not permit the Union in the plant (pp. 4–5). During the Union campaign after the Board had issued its direction of election, Derry Smith called shake-out crews working under him away from their work to tell them that he had heard Osbrink say that the plant would be closed if the Union won the election (*supra,* p. 4). Midway in the organizational campaign, Smith and Watkins, of respondent's supervisory staff, let it be known that LeFlore had been discharged because he had talked too much about the Union; Smith told Goynes, a fellow member of LeFlore's crew, that Goynes, too, had been slated for discharge because of his Union activity, intimated that he had been saved only because of Smith's intervention, and told him that LeFlore had been seen distributing Union pamphlets and would never be reinstated. During the afternoon before the election, Osbrink promised the employees financial benefits in return for the defeat of the Union by offering to match any funds which the employees might raise for sick relief, entertainment or kindred purposes as an alternative to paying union

dues (*supra,* pp. 4–5). These activities constitute well recognized forms of interference, coercion, and restraint within the meaning of Section 8 (a) (1) of the Act.[12]

Respondents resist the finding of the Board in respect to the remarks of Derry Smith on the ground that Derry Smith was not a supervisory employee and could not, therefore, render respondents liable for his remarks. The record, however, shows that Smith possessed supervisory authority. According to Rasp, superintendent of the foundry, Smith was "completely over" respondents' shake-out crews, which comprised 20 or 30 men and which were located at 4 different spots in the foundry (R. 34; 374–375, 386). Newly hired men, on being assigned to shake-out work, were instructed by Rasp to take orders from Smith. Smith directed the training of these employees, placing them with experienced workers, and transferring them from one crew to another on his own initiative. Thus, when Smith's brother was first employed, Smith placed him with LeFlore, telling him that LeFlore was a good worker and could show him what to do (*supra,* pp. 6–7). Smith spent about half his time going from crew to crew to instruct and to supervise (R. 35; 225, 259, 275). Five of the shake-out men who testified at the hearing stated that they considered Smith to be

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[12] Threat to close plant: *N. L. R. B.* v. *J. G. Boswell Co.*, 136 F. 2d 858, 590 (C. A. 9). Promise of benefits: *N. L. R. B.* v. *Medo Photo Co.*, 321 U. S. 678, 686; *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732, 739 (C. A. D. C.), certiorari denied, 341 U. S. 914; *N. L. R. B.* v. *Kropp Forge Co.*, 178 F. 2d 822, 828 (C. A. 7), certiorari denied, 340 U. S. 810; *N. L. R. B.* v. *Swan Fastener Corp.*, 199 F. 2d 935, 937–938 (C. A. 1).

their "boss." (R. 193, 223, 234, 257, 272). Rasp received complaints from Smith concerning employees in the shake-out department and asked or consulted Smith in the matter of wage increases (R. 34; 387). Under these circumstances, the Trial Examiner and the Board were wholly justified in holding that Smith was properly to be identified with management and that the employees would reasonably make such identification, particularly when Smith purported to express the viewpoint of management. *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80–81; Cf. *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 520; *N. L. R. B.* v. *Link Belt Co.*, 311 U. S. 584, 598–599; *N. L. R. B.* v. *Germain Seed & Plant Co.*, 134 F. 2d 94, 96–97 (C. A. 9); *N. L. R. B.* v. *Laister-Kauffmann Aircraft Corp.*, 144 F. 2d 9, 15 (C. A. 8); *N. L. R. B.* v. *Engineering and Research Corp.*, 145 F. 2d 271, 272 (C. A. 4), certiorari denied, 323 U. S. 801.

B. The Board properly found that LeFlore and Plummer were discharged because of union activity in violation of Section 8 (a) (3) and (1) of the Act

The facts summarized above amply support the finding of the Board that respondents discriminated against John LeFlore, Jr., and Archie Plummer in violation of Section 8 (a) (3) and (1) of the Act.

Respondents' hostility to the Union was well known in the plant; rumors had been current since October that the plant would be closed if the Union came in. Despite this hostility LeFlore had, almost from the day he was employed, vigorously and openly advocated Union membership to every employee with whom he

came into contact (*supra,* pp. 7–8). When the Union embarked upon a campaign to unionize the plant in the late fall of 1950, LeFlore had been its most active supporter at the plant, and had, of his volition, collected and submitted to the Union names and addresses of potential Union members among his fellow employees (*supra,* pp. 7–8).

The Union campaign was intensified and reached its height between the issuance of the Board's direction of election January 2, 1952, and the election itself on January 25. Definite steps were taken by respondents during this period to insure the defeat of the Union. The first of these was the discharge of LeFlore. This action was taken at the direction of Rasp, the foundry superintendent, without either notice to or consultation with LeFlore's immediate superior, Derry Smith. Smith, who considered LeFlore a good worker, told Goynes, one of LeFlore's fellow crew members, the day after the discharge that he would try to get LeFlore back again, but a few days later, both Watkins, Rasp's assistant who had handed LeFlore his discharge slip, and Smith told Goynes that LeFlore had been discharged because he talked too much about the Union, (*supra,* p. 9). A week after the discharge Smith told LeFlore, in the presence of other employees that he had wanted to ask for LeFlore's reinstatement, but was unwilling to do this after LeFlore had been seen handing out Union literature outside the plant and predicted that LeFlore would never be reemployed (*supra,* pp. 8–9).

Archie Plummer also talked in favor of the Union before the election (*supra,* pp. 11–12). He injured his back in December, however, and was not in the plant just before the election. Rasp identified him as a prominent Union member when he saw him serving as a Union observer at the counting of the ballots on the day of the election, January 25, 1952 (*supra,* p. 12). When he returned to the plant on February 13, he continued to talk about the Union, even though the Union had lost the election. A fortnight later he was discharged purportedly for "absenteeism and tardiness" after he had been absent, with permission from his foreman, for a few days to visit his doctor. The record showed, however, that many employees indulged in unexcused absences and respondents frankly admitted that employees in his plant were not customarily discharged for either absenteeism or tardiness (*supra,* p. 13). These facts alone would warrant the conclusion that the discharge of both LeFlore and Plummer were motivated by a desire to get rid, before the election, of the most vigorous leader of the Union activity in the plant, and after the election, of an employee identified by respondent as a prominent Union member, who continued to discuss the Union even after the Union's defeat.

The Board's findings of discrimination are further supported by "the fact that the explanation[s] of the discharge[s] offered by the respondent did not stand up under scrutiny." *N. L. R. B.* v. *Bird Machine Co.,* 161 F. 2d 589, 592 (C. A. 1). Respondents admitted that they could point to no specific instance of faulty work or misconduct on the part of LeFlore on or near

the date of the discharge as the cause of the discharge. They relied, rather, upon a general allegation, appearing in the answer to the Board's complaint (R. 20), that LeFlore constantly wandered about the plant outside his designated work area. To support this allegation respondent depended in great part on the testimony of Mose Harris, a furnace tender under whom LeFlore worked for the first few weeks of his employment. Harris stated that LeFlore would be absent from his post, necessitating the securing of a substitute "three or four times a day" and Rasp, respondents' foundry superintendent, testified that he transferred LeFlore into another department in order to "snap him out of" this fault. Rasp admitted upon questioning, however, that LeFlore was transferred at his own request (*supra,* p. 10). If Harris had in fact to seek constantly for a substitute to do LeFlore's work, it is incredible, as the Trial Examiner pointed out (R. 40), that LeFlore, an employee who was scarcely more than a common laborer, would have been transferred to another department at his own request and would thereafter have been retained in respondents' employment. Respondent also sought support in the testimony of Christensen, a molder without journeyman status to whom LeFlore, as a member of a 3-man shake-out crew had supplied materials and shaken out castings for a few weeks before Christmas 1951, and who stated that LeFlore was careless in his work and wandered about the plant (*supra,* p. 10). However, Christensen was displeased with the entire crew, and asked that the entire crew, not just LeFlore, be replaced (*supra,* p. 10). There is evidence, moreover,

that his displeasure may have had a personal basis: he admitted that when anything went wrong with the castings, for which normally he was held responsible, he blamed LeFlore and his crewmate Goynes. Christensen also related that he had heard LeFlore boast that he LeFlore had the record for staying in the restroom, but admitted on cross examination that he knew that LeFlore had made this remark in jest.

Finally, there is no evidence that respondent considered Christensen's complaints to have any substance at the time they were allegedly made. Derry Smith testified that LeFlore would leave his floor during working hours and that he called this to LeFlore's attention (*supra,* p. 11). However, there is no evidence that this matter was ever called to the attention of Rasp or that his warning provided the basis for LeFlore's discharge. Smith did not deny that he placed his brother under LeFlore to train, that he had told LeFlore upon one occasion that if all the employees in the department were as good as LeFlore there would be very little to worry about, that he had spoken of LeFlore's excellence to at least one other employee, or that he was at first at a loss to explain LeFlore's discharge and had told employee Goynes that he intended to ask for his recall. Rasp, who discharged LeFlore testified that he had observed LeFlore away from the job and had spoken to him about it. However, since his testimony that he had transferred LeFlore to the shake-up department because of this fault was admittedly not correct, and since he admittedly could point to no specific dereliction on the

part of LeFlore at or near the time of the discharge, the Trial Examiner and the Board were fully warranted in not considering his testimony as of controlling weight.

Respondents' asserted reason for the discharge of Plummer likewise failed to stand up under scrutiny. Respondents asserted in the answer to the complaint (R. 20) that Plummer had been discharged because of "absenteeism and tardiness" and cited the single instance of the morning of February 23, when Plummer was absent a few hours in the morning to visit his doctor. At the hearing respondent spoke not only of the morning of February 23, but also of previous absences. However, it appears clearly in the record that respondents did not have a policy of dismissing employees for being absent. Chuck O'Day, a managerial representative, in his speech on the eve of the election, asked the employees where they could find a shop where "the worker can show up for work a day or two out of a week and still retain his job" and pointed out that "some men have constantly violated this privilege, but so far not many have received more than a good bawling out" (*supra,* p. 13). Osbrink specifically admitted that it was not respondents' policy to discharge for absence (*supra,* p. 13) and the company records show that numerous employees had many unexcused absences noted on their records (*supra,* p. 14, n. 10). Indeed, Plummer had fewer than many other employees and the bulk of those recorded in Plummer's case occurred during his illness (*supra,* p. 10). Moreover, there is no evidence that respondent was disturbed over any of Plummer's absences

at the time of his return to the plant on February 13. Under these circumstances, the assertion that he was discharged for an absence of a few hours on February 28, for which he had obtained his leadman's permission, is not worthy of credence.

At the hearing, respondents alleged that Plummer was also discharged because he was "lax and unsatisfactory in the performance of his duties." It introduced in support of this allegation the testimony of Mose Harris, who stated that when Plummer worked for him, he sat around on a box when he should have been working; the testimony of Walker, who stated that Plummer was absent 2 or 3 times when needed; and the testimony of Rasp to the effect that Plummer "never got in the pitch" with the other boys and gave the appearance of not wanting to work. The Trial Examiner who had an opportunity to observe the witnesses, discredited the testimony of Harris and pointed out that in any event Plummer had not worked with Harris for months before his discharge. An employer's reliance for the discharge of an employee upon events occurring in the past and not then thought to merit discharge can properly be uniformly discounted in determining the true motive for the discharge. *N. L. R. B.* v. *Whitin Machine Works,* 204 F. 2d 883, 885 (C. A. 1); *N. L. R. B.* v. *J. G. Boswell Co.,* 136 F. 2d 585, 595 (C. A. 9); *N. L. R. B.* v. *Arcade Sunshine Co.,* 118 F. 2d 499, 451 (C. A. D. C.), certiorari denied, 313 U. S. 567; *Peoples Motor Express, Inc.* v. *N. L. R. B.,* 165 F. 2d 903, 906 (C. A. 4); *N. L. R. B.* v. *Eclipse Molded Products Co.,* 126 F. 2d 576, 581 (Erickson) (C. A. 7). There is no evidence that

Walker ever complained to his superior about Plummer; and the testimony of Rasp in respect to whether he did in fact order the discharge, or whether he had anything to do with it whatsoever, set forth in some detail in the Intermediate Report (R. 52–55), is so contradictory as to wholly destroy Rasp's credibility in respect to the discharge.

Under these circumstances the Board was wholly justified in finding that the discharges of both LeFlore and Plummer were motivated by knowledge of the Union activity of these employees and a determination to discourage such activity in the plant. Discharges so motivated violate Section 8 (a) (3) and (1) of the Act.

C. The Board's findings of violation of Section 8 (a) (1) of the Act are not barred by the six months time limitation provisions of Section 10 (b) of the Act

Section 10 (b) of the Act provides that the Board may issue a complaint "whenever it is charged that any person has committed an unfair labor practice." A proviso to this Section, added by the Taft-Hartley Act, provides that:

> No complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing and service of the charge * * *

All the activities of respondents which the Board found to constitute unfair labor practices in the instant case occurred within 6 months of the filing of the charge and therefore are within the literal limitation period established by the proviso.

Respondents contend, however, that the Board is precluded by this section of the Act from making any findings in respect to independent violations of Section 8 (a) (1) of the Act because (a) the charge filed by the Union did not specifically allege such independent violations,[13] and (b) the complaint, in which the independent violations of Section 8 (a) (1) were first alleged[14] was not filed until more than 6 months after the alleged violations occurred. We maintain that this position is untenable. *N. L. R. B.* v. *Martin,* 207 F. 2d 655, 656–657 (C. A. 9).

The claim that the charge must set forth with specificity the precise violations alleged in the complaint is baseless. It is well settled that the charge in an unfair labor case "merely sets in motion the machinery of an inquiry * * * it does not even serve the purpose of a pleading," *N. L. R. B.* v. *Indiana & Michigan Electric Co.,* 318 U. S. 918. The issues in the case are formulated not in the charge, which may be filed by any one,[5] but in the complaint, on the basis of the investigation which the charge initiated. It has long been recognized by this Court and by the ma-

[13] The original charge filed on January 16, 1952, alleged the violation of Section 8 (a) (3) and (1) by the discharge of John LeFlore, Jr., and Benny Pratt. The charge was amended on January 21, 1952, to include the name of Leroy Jones, and on March 3, 1952, to include the name of Archie Plummer.

[14] Paragraphs 4 and 7 of the complaint (R. 16, 17) allege that certain activities of respondent interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act, thus violating Section 8 (a) (1) of the Act.

[15] As the Court of Appeals for the Tenth Circuit observed in *Kansas Milling Co.* v. *N. L. R. B.*, 185 F. 2d 413, 415, "anyone can file a charge. Many are filed by private citizens unskilled in the law or art of pleading."

jority of other circuit courts that a complaint issued under the amended Act is not limited in scope by the averments of the charge provided that the violations included in the complaint did not occur prior to the 6-month period of limitations established by the proviso. The *Martin* case, *supra; N. L. R. B.* v. *Globe Wireless, Ltd.,* 193 F. 2d 748, 752 (C. A. 9); *N. L. R. B.* v. *Dinion Coil Co.,* 201 F. 2d 484, 491 (C. A. 2); *Stokely Foods, Inc.* v. *N. L. R. B.,* 193 F. 2d 736, 737–738 (C. A. 5); *N. L. R. B.* v. *Bradley Washfountain Co.,* 192 F. 2d 144, 149 (C. A. 7); *Cusano* v. *N. L. R. B.,* 190 F. 2d 898, 903–904 (C. A. 3); *N. L. R. B.* v. *Kobritz,* 193 F. 2d 8 14–16 (C. A. 1); *N. L. R. B.* v. *Cathey Lumber Co.,* 185 F. 2d 1021 (C. A. 5), affirming, *Cathey Lumber Co.,* 86 N. L. R. B. 157, 158–163 (vacated on grounds not here pertinent 189 F. 2d 428); *N. L. R. B.* v. *Westex Boot and Shoe Co.,* 190 F. 2d 12, 13 (C. A. 5); *Kansas Milling Co.* v. *N. L. R. B.,* 185 F. 2d 413, 415 (C. A. 10); *Consumers Power Co.* v. *N. L. R. B.,* 113 F. 2d 38, 41–42 (C. A. 6); *Katz, et al.* v. *N. L. R. B.,* 196 F. 2d 411, 415 (C. A. 9); *N. L. R. B.* v. *Radio Officers,* affirmed by the Supreme Court, February 1, 1954, sl. op., p. 14, n. 30.

Analysis of these cases reveals that in several instances the complaint named discriminatees or dischargees in addition to those originally named in the charge (*Cathey Lumber, Dinion Coil, Kansas Milling, U. S. Gypsum, Consumers' Power*); in other instances the complaint added activities related to the unfair labor practices charged (*Gaynor News, Westex Boot*); and in still other instances the complaint added unfair labor practices not mentioned in the charge

(*Bradley Washfountain, Stokely Foods, Kobritz*). Clearly, then, absence of detailed allegations in the charge is not a necessary prerequisite to the validity of complaint provisions.

But respondents contend that since the independent Section 8 (a) (1) violations were first alleged in the complaint, they must have occurred within 6 months of the issuance of the complaint or be barred by the proviso. This contention is also, we submit, untenable.[16] The proviso speaks specifically and explicitly in terms of the date of the filing of the *charge,* prohibiting the issuance of a complaint based upon "an unfair labor practice occurring more than 6 months *prior to the filing of the charge* with the Board * * *" [Emphasis added.] Since there is no requirement that the complaint be issued within 6 months of the practice alleged in the charge, respondents' interpretation of the proviso would in fact necessitate the establishment of two time tables—one for practices alleged in the charge and one for

[16] Respondents apparently rely in this regard on the *Globe Wireless* case. We believe that reliance is misplaced. In *Globe Wireless*, as here, the complaint alleged independent violations of Section 8 (a) (1) not specifically alleged in the charge. This Court rejected as without basis the view that the complaint was limited to the averments of the charge, but disposed of the case on the narrow ground that the complaint itself issued within 6 months of the violations in question. Because of this unique circumstance, the Court did not have to pass on the issue here presented, namely whether a timely charge, even though not couched in precise and specific terms, supports specific allegations in a subsequent complaint issued after the 6-month limitations period. For reasons here set forth, we submit that the Board's view, supported almost uniformly by the courts, is correct. See the *Martin* case, *supra.*

practices occurring simultaneously with or later than those alleged in the charge, which were discovered by the Board in the investigation initiated by the charge but omitted from the charge either through ignorance or lack of skill on the part of the charging party. Such a result is clearly not sanctioned by the Act, which has nowhere established a time relationship between either the commission of the unfair practices or the filing of the charge and the Board's final formulation of the issues of the case in the complaint. A rule which precluded the Board from including in the complaint unfair practices unearthed during its investigation occurring more than 6 months before the issuance of the complaint but within 6 months of the filing of the charge, would fail to effectuate the purposes of the Act. "In considering the sufficiency of the complaint in * * * respect [to the unfair practices alleged] it is necessary to bear in mind that the nature of the proceeding is not punitive but preventative and in the interests of the general public" *Consumers Power Co.* v. *N. L. R. B.,* 113 F. 2d 38, 42 (C. A. 6).

The activities alleged in paragraph 4 of the complaint as independent violations of Section 8 (a) (1) of the Act in the instant case all arose either in connection with the discharge of Plummer on January 16, 1952 (named in the charge), or in connection with the organizing campaign which was being conducted in the plant at the time of the discharge and which culminated in the election conducted by the Board on January 25. Those violations of Section 8 (a) (1) of the Act which occurred in con-

nection with the discharge of Plummer, consisting of remarks by supervisory employees Smith and Watson to the effect that Plummer had been discharged and would not be reemployed because of his union activity, together with the implied threat to employee Goynes that the same fate might await him, could well have been proven under the 8 (a) (3) allegation of the complaint. Allegations of these activities as independent violations of Section 8 (a) (1) represented only at best a slight but permissible change of legal theory. See the *Martin* case, *supra; Cusano* v. *N. L. R. B.,* 190 F. 2d 898, 903–904 (C. A. 3). See also *N. L. R. B.* v. *Syracuse Stamping Co.,* 208 F. 2d 77, 78 (C. A. 2).

The remaining violations of Section 8 (a) (1) found by the Board occurred during the campaign preceding the election of January 25 and consisted of threats made by respondents' supervisory employees that the plant would be closed and that the employees would be deprived of benefits if the Union won the election, and promises by Osbrink in his speech of January 24 of financial aid as an alternative to the payment by the employees of union dues. Respondents were aware as early as February 1, 1953, a few days after the election, that their preelection conduct had been made the subject of Union protest in the Union's Objections to the Conduct of the Election, filed with the Board, and that the Board was undertaking an investigation. Indeed, the threat to close the plant had been specifically listed as one of the Union's objections, and was denied by respondents in their answer to the Objec-

tions filed on March 7, 1952. On July 25, 1952 when the Regional Director issued his complaint, he included in the allegations of independent violations of Section 8 (a) (1) of the Act certain of respondents' activities first complained of in the Objections to the Conduct of the Election, certain other activities connected with the election but not mentioned in the objections, which he had discovered in his investigation of the objections, and certain activities in connection with the discharge of Plummer. All these activities occurred within 6 months of the filing of the charge. Respondent cannot, under the circumstances claim that they were surprised at their inclusion in the allegations of the complaint of the consolidated case. In any event, the complaint fully informed respondents in detail of the issues of fact to be tried, respondents answered denying the allegations of the complaint, and the issues were fully litigated at the hearing.

It is submitted that the enlargement of the complaint in the instant case by the inclusion therein of an allegation that certain activities occurring within 6 months of the filing of the charge initiating the case constituted violations of Section 8 (a) (1) is wholly permissible.

D. Region 6 of the United Automobile Workers, CIO, is not an independent labor organization and the filing requirements of Section 9 (f) (g) and (h) are inapplicable to it

The original unfair labor practice charges in this case were filed by International Union United Automobile, Aircraft and Agricultural Implement Workers

of America, CIO, Region 6. Throughout the proceedings, whenever reference was made to the charging union, the designation of the Union followed the description in the charge.[17] Upon the issuance of the Decision and Order of the Board respondents filed a Motion for Reconsideration, Motion for Rehearing, and Motion to Dismiss on the ground, *inter alia,* that "Region 6" of the Union had not complied with the requirements of the Act set forth in Section 9 (f), (g), and (h) and that all the proceedings in the case from the issuance of the complaint through the issuance of the Board's Decision and Order were "beyond the power and authority of the Board" (R. 85). Thereupon the Board issued a Supplemental Decision and Order in which it found that "Region 6" was merely a geographical district of the Union, not an independent labor organization, and "in order to avoid any further ambiguity," amended its Decision and Order to avoid all mention of "Region 6" (R. 103). Respondent is nevertheless repeating its contention with respect to "Region 6" before this Court, and takes the position that the Board was without jurisdiction to proceed in the case by reason of the failure of "Region 6" to comply with the filing requirements of the statute (R. 116).

The position taken by the Board, we submit, is manifestly correct. According to the constitution of the UAW–CIO, each region represents a geographical area from which local unions within the area select an

[17] The caption in the representation case, with which the unfair labor practice case was consolidated, omitted any reference to "Region 6" (R. 1).

International Executive Board Member, who also serves as the regional director for that region. "Region 6" covers the States of Washington, Oregon, California, Idaho, Nevada, Utah, and Arizona (R. 102).[18]

The regional director serves as the *administrative officer for his region under the general supervision of the International President.* He exercises direct supervision over organizational activities within his region. Article 13, Section 28 of the constitution provides that he "shall examine all contracts negotiated within his region before they are signed and submit them to the International Executive Board with his recommendation, negotiate disputes with the bargaining committees whenever possible, act to obtain favorable legislation for labor and work for the general welfare of the membership" (R. 120). Section 29 of Article 13 provides that he shall attend meetings of district councils within his region, if any exist, "when possible and work in cooperation with such councils; that he shall submit quarterly reports of organizational activity within his region to the International President and to the International Board for its approval. Article 49, Section 2 provides that he

[18] The Board took official notice of the provisions of the constitution of the UAW–CIO which respondents attached as an appendix to their brief before the Board. The pertinent provisions of the constitution are presently before this Court in *N. L. R. B.* v. *Grand Central Aircraft Co., Inc.*, No. 14010, in which the respondent there raised the same issue in respect to "Region 6" as is raised in the instant case. The provisions of the constitution here relied upon are set forth at pp. 925–931 of Volume II of the record in that case.

shall also transmit strike action voted by the local union with his recommendation, for the approval or disapproval of the National Executive Board (R. 102).

The regions do not have separate constitutions or bylaws. They do not, as such, collect dues. The regional director is the only elected officer in the region. His salaries and duties are prescribed by the constitution of the International Union and it is clear that he serves in his capacity as the regional director merely as an *administrative officer* of the International Union (R. 102–103). There is no evidence in the record to sustain respondent's contention that "Region 6" or any of the other regions into which the International Union is divided, is a separate labor organization. In view of this fact, it was not necessary for "Region 6" or any of the other geographical regions of the union to be in compliance with Section 9 (f) (g) and (h) of the Act. The *International Union* has complied with the requirements of the Section and the regional director has filed a non-Communist affidavit required by the Section in his capacity as a member of the International Executive Board of the International Union (R. 103).

Obviously, therefore the "Region" is merely the device of a nationwide union to provide the flexibility necessary to meet local conditions in each geographical area, and the International Executive Board member is the instrumentality employed by the International Union to accomplish this purpose. We submit that the insubstantial nature of respondents' contention is plainly established. As in all such cases where it is suggested that an individual or union seeks to circum-

vent the filing requirements of Section 9 (h) of the Act, the Board acts "so as to preclude even the possibility of such result."[19] In the instant case investigation reveals that the "union," which allegedly attempted to circumvent Section 9 (h), was merely an administrative arm of a union in full compliance with all the requirements of the Act. See *N. L. R. B.* v. *S. H. Kress & Co.,* 194 F. 2d 444 (C. A. 6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board's findings, conclusions and order are valid and proper and that a decree should issue enforcing the order in full.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
ARNOLD ORDMAN,
MARGARET M. FARMER,
Attorneys,
National Labor Relations Board.

MARCH 1954.

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[19] Board's Fourteenth Annual Report (1949), p. 16; Board's Fifteenth Annual Report (1950), p. 22.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

Prevention of Unfair Labor Practices

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice

(listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testi-

mony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1954

No. 14073.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

R. H. OSBRINK, M. E. OSBRINK, and BERTON W. BEALS as Trustee, Co-partners, Doing Business Under the Firm Name and Style of R. H. OSBRINK MANUFACTURING COMPANY,

Respondents.

BRIEF OF RESPONDENTS.

FRANK M. BENEDICT,
458 South Spring Street,
Los Angeles 13, California,

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
634 South Spring Street,
Los Angeles 14, California,
Attorneys for Respondents.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Petitioner,

vs.

R. H. OSBRINK, M. E. OSBRINK, and BERTON W. BEALS as Trustee, Co-partners, Doing Business Under the Firm Name and Style of R. H. OSBRINK MANUFACTURING COMPANY,

Respondents.

BRIEF OF RESPONDENTS.

Statement of Case and Issues.

This proceeding is before the court on the petition of the National Labor Relations Board for enforcement of its order against the Respondent.

The proceedings herein are of two types. One is an unfair labor practice proceeding, and the other is a representation case consolidated with the unfair labor practice case for the purpose of considering objections to conduct affecting the results of the election.

The unfair labor practice case was initiated by the filing of a charge which was twice amended, being General Counsel's Exhibits (hereinafter referred to as "G. C. Ex.") 1-A, 1-C and 1-E.

The complaint alleges the discharge of two employees for the reason that they engaged in Union and concerted activities for their mutual aid and protection and to that extent the complaint followed the allegations of the unfair labor practice charges referred to. The complaint further alleged, however, in paragraph 4, seven independent violations of Section 8(a)(1) of the Act, none of which were alleged in the unfair labor practice charges. All of the matters alleged in paragraph 4 of the complaint occurred more than six months prior to the issuance of the complaint.

The objections to conduct affecting the results of election [G. C. Ex. 1-O] set forth a number of incidents as a basis for the objections. At the beginning of the hearing the Trial Examiner brought forth from the General Counsel exactly what he was prosecuting so far as concerns the objections [R. 122-126]. The General Counsel therein specified the limits of his case.

After hearing, the Trial Examiner issued his Intermediate Report in which he found that the Respondent had committed the following unfair labor practices:

1. The discharges of LeFlore and Plummer in violation of Section 8(a)(3) of the Act.

2. The speech of Mr. Osbrink to the employees on January 24, 1952.

3. A statement by one Derry Smith, allegedly a supervisor, that Respondent would close the plant if the Union won the election.

4. Another alleged statement by Smith to employee Goynes that Respondent would withdraw certain privileges if the Union won the election.

5. Another statement of Smith to Goynes that the latter was slated for discharge for Union activities.

6. Another statement allegedly made by Smith to the effect that LeFlore would not be rehired since he had been seen passing out Union pamphlets.

7. Another statement allegedly made by Smith and one Watkins (whom the General Counsel contends is a supervisory employee) to the effect that LeFlore's discharge was for Union activity.

With respect to the representation cases, the Trial Examiner further recommended that the election, which had been lost by the charging Union, be set aside on the grounds that the Respondent's conduct had illegally interfered with the election. His recommendation is based, in part at least, upon a finding that on the day of the election the Respondent withheld pay checks from the employees until after they had voted, and he concluded that this was an illegal interference with the election.

The Trial Examiner, with only a few exceptions, in each case of conflict between testimony of witnesses resolved the conflict in favor of the General Counsel and against Respondent. The exceptions were minor and did

not in any way affect the results of the proceeding. He likewise discredited virtually all testimony of Respondent's witnesses, including testimony on which there was no conflict or contradiction.

The case was then transferred to the full Board and the Respondent filed timely exceptions to the Intermediate Report, together with a motion to dismiss the complaint, and brief. Neither the General Counsel nor the charging party filed any exceptions to the Intermediate Report nor did they file briefs with the Board. The Board thereupon issued its decision which adopts all of the findings and rulings of the Trial Examiner. Thereafter, the Respondent made a motion for reconsideration based in part upon grounds already called to the Board's attention and also based upon a ground not theretofore urged to the Board, the noncomplying status of the charging Union. The Board thereafter issued its supplemental decision denying the motion for reconsideration but nevertheless amending its order and decision and making certain additional findings of fact.

Thereafter, the Board filed its petition for enforcement in this court.

A statement of the facts involved with respect to each of the Board's findings will be given under the titles in which the various points are discussed.

Summary of Argument.

The following is a brief statement of Respondent's position.

1. The charge filed herein and its amendments alleged only violations of the Act by the discharge of certain named employees. The complaint, which was issued more than six months after the events complained of, for the first time alleged violations of the Act by certain other conduct such as coercive statements to employees and promises of benefit if they would refrain from Union activity. We contend that the six month statute of limitations which is incorporated in Section 10(b) of the Act bars any consideration of these alleged violations which were pleaded for the first time in the complaint. This argument is not that the complaint cannot enlarge upon the charge. The argument is that the enlargement here, coming more than six months after the occurrence of the events and not being related to any material contained in the timely charge, is barred by the statute of limitations.

2. The Trial Examiner's findings with respect to certain alleged coercive statements are supportable only because of his finding that certain employees were supervisors within the meaning of the Act. These employees, Derry Smith and Wally Watkins, were in fact not supervisors. They were not identified with management, and the employees would not have considered them as identified with management or as having authority to speak

for management. The evidence can only support a finding that these employees are not supervisory employees.

3. The finding of the Trial Examiner and the Board that LeFlore and Plummer were discharged to discourage Union activity is not supported by substantial evidence on the record considered as a whole. Indeed, the weight of the evidence proves that they were discharged for cause. In ruling on these discharges the Trial Examiner in effect places the burden of proof upon Respondent and discredits sworn testimony of Respondent's witnesses in the absence of conflict of testimony and without giving sufficient weight to the testimony.

4. The proceedings were not conducted in accordance with the requirements of law. The findings of unfair labor practices include matter which the General Counsel did not include in the original statement of his case, and which were not included in the complaint as it can be fairly interpreted. Indeed, the Respondent learned for the first time upon reading the Intermediate Report that certain conduct was alleged to be in violation of the Act. We further contend that the Trial Examiner did not weigh or consider all of the evidence and that he used superficial and hypertechnical standards in considering the testimony of Respondent. We also submit that the Trial Examiner bases his decision, at least in part, on wholly incompetent and irrelevant evidence.

5. The charge herein (and its amendments) was filed by the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, *Region 6*. The Trial Examiner, among his conclusions of law, found [R. 57] that organization to be "a labor organization . . ." within the meaning of the Act. He

further states that the charge was filed by that organization [R. 23]. His findings of fact included a finding that the charging union "is a labor organization within the meaning of the Act" [R. 26]. No exceptions were made by any party to these findings, and the Board adopted them in its decision and order. It is the fact that Region 6 has never complied with Section 9(f), (g) and (h) of the Act. When that fact was called to the Board's attention by the Respondent's motion to dismiss, the Board amended the decision and order to delete the term "Region 6" from the name of the charging organization and wherever it occurred in the decision and order. We contend that the findings of the Board in the absence of timely exceptions as provided by its own Rules and Regulations cannot be altered in this manner and must now be deemed to be conclusive. Since Region 6, if a labor organization, is not in compliance with the Act, the proceeding must be dismissed. We further contend that even if the Board may amend its Decision and Order, it may not do so by the manner in which it proceeded; that is, without notice to the parties and upon evidence not offered at the hearing or properly before the Board.

6. The talk to employees by Mr. Osbrink on the day before the election, fairly interpreted, cannot be considered as coercive or containing promise of benefit if the employees would reject unionization. The sentence relied upon by the Trial Examiner cannot be separated from its context and it must be construed in the light of the entire speech and surrounding circumstances.

7. The withholding of pay checks until after employees had voted is not a violation of law. To hold that such conduct vitiates an election is unrealistic.

ARGUMENT.

I.

The Board's Finding as to Independent Violations of Section 8(a)(1) Are Barred by the Six Month Time Limitations as Provided for in Section 10(b) of the Act.

The original charge initiating this proceeding was filed on January 16, 1952, and was later amended on January 21 and March 4, 1952. The charge and two amended charges claimed certain violations of the Act arising from alleged discriminatory discharges of certain specified employees as prohibited by Section 8(a)(3) of the Act. While violations of Section 8(a)(1) were also alleged as a result of this conduct, such violations would only be within the purview of Section 8(a)(1) in so far as all violations of Section 8(a) are automatically considered to be in breach of Section 8(a)(1). It should be noted that the printed form provided by the Board for the purpose of filing unfair labor practice charges against employers, a copy of which was employed in this case, contains an allegation of violation of Section 8(a)(1) as part of the printed substance of that form. The charging party adds the more specific violations of the Act that are claimed as a result of the employer's conduct. Such a practice is in conformance with a long-established Board ruling that any violation of the provisions of Section 8(a) will, as a matter of course, constitute an interference with the rights of employees as set forth in Section 7 of the Act and, as such, condemned under Section 8(a)(1). Neither the charge nor the amended charges alleged any independent Section 8(a)(1) violations but were confined to the discharges.

The complaint in this proceeding was issued on July 25, 1952, and alleged the discharges as set forth in the initial charge and the amended charges. The complaint further alleged, however, in paragraph 4 thereof, seven independent violations of Section 8(a)(1) of the Act.

In specifying the independent violations of Section 8(a)(1) the complaint is based upon certain alleged statements of supervisory personnel, Mr. Osbrink's speech to the employees, and alleged questioning of employees. All of these acts occurred on or before January 24, 1952, which was a date six months prior to the issuance of the complaint on July 25, 1952. Some of these actions took place as early as October of 1951 [R. 209-210, 227, 240-242, 243-244, 245-246, 251, 263-264, 264-266, 280, 293-294, 317]. There is no question that Mr. Osbrink's speech occurred on January 24, 1952.

It is the contention of the Respondent that under the provisions of Section 10(b) of the Act the independent violations of Section 8(a)(1) as set forth in the Board's complaint are barred by the six-month period of limitations. Section 10(b) provides:

> "(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any

> unfair labor practice occurring more than six months prior to the filing of the charge . . ."
>
> National Labor Relations Act, as amended, Sec. 10(b).

If the intention of Congress as expressed in the foregoing section is to have any meaning or force, the charges of independent violation of Section 8(a)(1) must be held to be barred under the time limits of Section 10(b). What the Petitioner is in fact contending for is a complete nullification of Section 10(b) in so far as it imposes any time limits upon the initiation of unfair labor practice proceedings. If such a contention is adopted, the limitation provision can be completely circumvented by filing broad and indefinite charges under Section 8(a)(1); and then at any period after the lapse of six months amending those charges or issuing a complaint alleging new and different unfair labor practices. Such a practice would clearly be inconsistent with the purposes of Congress in enacting Section 10(b).

An analysis of Section 10(b) indicates that in providing for the issuance of a complaint Congress identified the complaint as "a complaint stating the charges in that respect." The charges in question are identified in a preceding clause: "Whenever it is charged that any person has engaged in or is engaging in any *such* unfair labor practice." It was clearly intended then that the complaint was to be based upon the charges of unfair labor practices as such charges are filed with the Board since the phrase "the charges" as used in referring to the complaint clearly must relate to the initial use of the word "charged" as it appears in the first clause of Section 10(b).

The Respondent recognizes that the Board and the courts have on frequent occasions permitted the Regional Director to issue a complaint which was not restricted to the precise allegations of unfair labor practices as set forth in the charge. However, in permitting such a practice the courts have clearly indicated that it is to be applied only within narrow limitations. In the decision of this court in *N. L. R. B. v. Globe Wireless* (C. A. 9, 1951), 193 F. 2d 748, it was expressly stated that the Board was not prohibited by the amended Act from enlarging upon a charge, but the reservation was expressed that the additional unfair labor practices as alleged in the complaint must not have been committed "more than six months prior to the enlargement." In the decision this court found that the enlarged complaint was valid since the acts upon which the enlargement was based were committed within a period six months prior to the filing of the complaint.

In restricting the enlargement of the complaint to situations where the additional allegations of violations of the Act have occurred within six months preceding the issuance of the complaint this court acknowledged and gave full force to the intention of Congress in enacting Section 10(b). Since the Act requires that charges must be filed within six months of the action complained of, it must follow that where such acts are initially set forth in the complaint and are not based upon, or related to, previous allegations set forth in the charges, they also must meet the time requirements of Section 10(b). In effect, that portion of the complaint which is not set forth in a timely filed charge must be considered the same as an initial charge and must come within the purview of the limitations provisions as set forth in Section 10(b).

If a contrary construction were permitted, the protection afforded by Section 10(b) could be easily frustrated in that the defendant would never be certain as to what activities would be subject to investigation and prosecution as long as any charges were on file. The Regional Director would then be permitted to issue a complaint based on activities not set forth in the charge, or related to the charge, and which may have occurred more than six months prior to the issuance of the complaint. Such could not have been the intention of Congress.

The Petitioner in its brief in this proceeding attempts to discount the *Globe Wireless* decision on the basis that the court was not presented with the precise question involved in this proceeding. However, it is clear from the language employed by the court in that decision that had the additional allegations as set forth in the complaint been based upon actions committed more than six months before the filing of the complaint, these allegations would have been held barred by the limitations provision of Section 10(b). If such were not the case, any reference to the six months period as it related to the enlargements would have been entirely superfluous. The nature of the enlargement was much the same as is involved in the instant case.

Where this court and other circuit courts have been presented with the question of the timeliness under Section 10(b) of unfair labor practice allegations set forth in the complaint or an amended charge, but not incorporated in the original charge, the courts have applied the "relation back theory" to test the validity of the new allegations in the complaint or the amended charges. In the application of this principle the courts have required

that in order for the additional allegations of unfair labor practices as set forth in the complaint to qualify under the limitation provisions of 10(b) where they cannot otherwise do so, they must bear a close relation to the violations of the Act as set forth in a timely filed charge or must more precisely define the allegations of the charge.

The Petitioner in this proceeding places great weight on the decision of this court in *N. L. R. B. v. Martin* (C. A. 9, 1953), 207 F. 2d 655, cert. den. ..... U. S. ....., 98 L. Ed. (Adv.) 392, but this decision is clearly distinguishable from the present question before this court and, in fact, adds support to the position of the Respondent. It is clear from that decision that the differences between the charge and the complaint were insignificant differences of description and not of substance. In rendering its decision, this court said:

> "Thus charge and complaint alike identified the allegedly illegal transactions by giving the names of the individuals concerned and the date of their dismissal. The difference between them is one of detail as regards the description of the activity engaged in."
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> *N. L. R. B. v. Martin,* 207 F. 2d 655, 656.

The court in reaching its conclusion expressly acknowledged the relation back theory and concluded that the charge supplied "an adequate foundation for the complaint."

This theory has also received the endorsement of the United States Supreme Court in *Radio Officers' Union v. N. L. R. B.* (1954), 98 L. Ed. (Adv.) 251, 264. In that decision the Supreme Court expressly stated its agreement with the decision of the court below in *N. L. R. B. v.*

Gaynor News Co. (C. A. 2, 1952), 197 F. 2d 719, in which Judge Frank in speaking for the court stated:

> "This section has been uniformly interpreted to authorize inclusion within the complaint of amended charges—filed after the six months' limitation period —which *'relate back'* or *'define more precisely'* the charges enumerated within the original and timely charge." (Emphasis added.)
>
> *N. L. R. B. v. Gaynor News Co.,* 197 F. 2d 719, 721.

In its brief the Petitioner cites numerous decisions of the circuit courts in support of its position that the findings of violations of Section 8(a)(1), which were included in the complaint but not in the charges, were proper despite the provisions of Section 10(b) of the Act. These decisions and other decisions of the circuit courts are either distinguishable from the instant proceeding before this court or are in support of the position urged by the Respondent.

In the case of *Cusano v. N. L. R. B.* (C. A. 3, 1951), 190 F. 2d 898, the charge alleged a discriminatory discharge as being in violation of Section 8(a)(1). An amended charge alleging the same facts specified the discharge as a violation of Section 8(a)(3). The Petitioner asserted that the complaint, in so far as it was based on the amended charge, was in violation of Section 10(b) since the acts therein complained of occurred more than six months prior to the filing of the amended charge. This contention was rejected by the court, however, on the basis that the original and the amended charges were based on identical factual situations. The court noted that the employer upon being served with the original

charge would retain records, interrogate witnesses and otherwise prepare his defense to the unfair labor practices complained of in that charge; that the employer would not be prejudiced by deviations between the charge and the amended charge as long as the amended charge was sufficiently related to the original charge. Such was the test that court used to see if the new charge could be "related back." Contrasting the factual situation in the *Cusano* case to the situation in this case, it is clear that the Respondent would be greatly prejudiced by the additional allegations of unfair labor practices as set forth in the complaint over those that were specified in the charge and amended charges. The statements made by foremen, the speech made by Mr. Osbrink, and the questioning of employees would all be unrelated to the discharges. Evidence which would be vital for an adequate defense of the independent violations of Section 8(a)(1) might therefore be forgotten or destroyed during the period between the commission of these alleged unfair labor practices and the issuance of the complaint.

An extensive analysis of the doctrine of "relation back" was undertaken in the case of *N. L. R. B. v. Vare* (C. A. 3, 1953), 206 F. 2d 543. In that case the court refused to apply the relation back theory where new and different defendants were cited in the amended charge, as well as a different basis for discriminatory treatment than had been alleged in the prior charge. Since the amended charge did not comply with the time requirements of Section 10(b), it was dismissed. In interpreting and applying the relation back theory, the court said:

> "Unless the cases have taken all the teeth out of the six-months limitation provision of Section 10(b), it must operate to require dismissal here.

"Many cases have construed Section 10(b) to allow untimely amendments to timely charges when the amendments 'relate back' or 'define more precisely' or 'bring up to date' the unfair labor practices alleged in the timely charge. National Labor Relations Board v. Epstein, 3 Cir., 1953, 203 F. 2d 482, and cases there cited. To fit within that rationale, however, the untimely charge must be, at least, an 'amendment.' The 'amended' charges here are really new and different charges alleging new and different unfair labor practices against a new and different respondent."

N. L. R. B. v. Vare, 206 F. 2d 543, 546.

In *N. L. R. B. v. Dinion Coil Co.* (C. A. 2, 1952), 201 F. 2d 484, the charges specified several cases of unlawful discharge under Section 8(a)(3). The complaint issuing from the charge included other employees who were also alleged to have been discriminatorily discharged. The court held that the additional discharges as set forth in the complaint were properly before the Board. In so holding the court found that all the additional discharges were closely related to the violations specified in the charge and could therefore properly be considered by the Board even though they may have occurred more than six months before the issuance of the complaint. In so holding, it was said:

"The holding of these decisions may be summarized thus: (1) A complaint, as distinguished from a charge, need not be filed and served within the six months, and may therefore be amended after the six

months. (2) If a charge was filed and served within six months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge, if (a) *they are closely related to the violations named in the charge,* and (b) occurred within six months before the filing of the charge." (Emphasis added.)

N. L. R. B. v. Dinion Coil Co., 201 F. 2d 484, 491.

This opinion has been recently affirmed by the same court in *N. L. R. B. v. Pecheur Lozenge Co.* (C. A. 2, 1953), 209 F. 2d 393, and relied on in support of a holding that allegations in a complaint alleging a refusal to bargain were proper despite the fact that they had not been set forth in the initial charges which were concerned with violations of Sections 8(a)(1) and (3). It was noted by the court that the complaint in so far as it alleged a refusal to bargain was based upon statements contained in a letter, which letter also constituted the foundation of the Section 8(a)(3) violations.

In *N. L. R. B. v. Kobritz* (C. A. 1, 1951), 193 F. 2d 8, several charges alleging various unfair labor practices were filed. Among these charges was a second amended charge which claimed a refusal to bargain on the part of the employer in violation of Section 8(a)(5). The same allegation was not included in a third amended charge but was incorporated during the hearing in an amended complaint. Even though the allegations in the complaint supporting the Section 8(a)(5) violation were

barred by the six-month limitation period, the court sustained their validity. However, in doing so, great reliance was placed on the fact that the original Section 8(a)(5) charge had been timely filed and even though not included in a later charge there was nothing to indicate the withdrawal of the timely charge.

The decision of the court in *Kansas Milling Co. v. N. L. R. B.* (C. A. 10, 1950), 185 F. 2d 413, serves as an excellent illustration of the extent to which the Board will go in circumventing the purpose and intent of Section 10(b). In that case the original charge asserted in broad and general language that the company had restrained and coerced its employees and had discriminated in regard to hire and tenure and had refused to bargain in good faith in violation of the employees' rights under Section 7. The amended charge alleged that the company had threatened its employees with loss of seniority and their jobs if they engaged in a work stoppage and further threatened them with discharge unless they repudiated the union. By such a decision the court, for all practical purposes, eliminated any substance to the limitations provisions of Section 10(b).

The dangers of a liberal application of the relation back theory are also illustrated in the decision of *Cathey Lumber Company v. N. L. R. B.* (C. A. 5, 1951), 185 F. 2d 1021, where that court affirmed without opinion a decision of the National Labor Relations Board cited at 86 N. L. R. B. 157. In this ruling the Board stated that a complaint which alleged additional discriminatory

discharges than were set forth in the complaint was valid, but in doing so broadly interpreted their power to enlarge upon the charges in the complaint without heed to the limitations provisions of Section 10(b).

The decision of the Fifth Circuit in the *Cathey Lumber Company* case was approved by the same court in *Stokely Foods, Inc. v. N. L. R. B.* (C. A. 5, 1952), 193 F. 2d 736. In that case the charge alleged violations of Sections 8(a)(1) and (3) arising from certain discriminatory practices by the employer. The complaint added independent violations of Section 8(a)(1) based upon the employer's interrogating and threatening employees. These additional allegations were challenged by the employer as being barred by Section 10(b). The court, however, rejected these contentions on the basis of its prior decision in the *Cathey Lumber Company* case.

It is admitted that the factual situation involved in the *Stokely Foods, Inc.* case is similar to that presented to the court in this proceeding, but this court should not be bound by the decision of the Fifth Circuit since it is an erroneous application of the law as applied by the other circuit courts and the Congressional mandate as set forth in Section 10(b). Clearly, there can be no relation between independent violations of Section 8(a) (1) and incidental violations of Section 8(a)(1) arising from discriminatory practices. The *Stokely Foods, Inc.* decision may be further challenged in that it relies on the *Cathey Lumber Company* decision which itself is rendered with-

out opinion and therefore is of questionable precedent value.

In *N. L. R. B. v. Bradley Washfountain Co.* (C. A. 7, 1951), 192 F. 2d 144, the court affirmed the holding of the Board that unfair labor practice allegations in the complaint which were not set forth in the charge were valid. The court did not consider the matter of time limits as it might affect its holding.

The application of the principle of "relation back" is not new to the federal courts, particularly in cases involving the statute of limitations. The Federal Rules of Civil Procedure, Rule 15(c), is itself an application of the relation back theory in that the period of limitations for amended pleadings will date from the original pleading where the amended pleadings arise out of the conduct, transaction or occurrence set forth in the original pleading. While the courts have liberally applied the principle of relation back, an amendment will not be permitted where it introduces a new cause of action which otherwise might be barred by the statute of limitations.

See:

Frymier v. Mascola (C. A. 9, 1929), 31 F. 2d 107;

Cyclopedia of Federal Procedure, Sec. 1848, p. 238.

The difficulty frequently arises in determining what constitutes a new cause of action. A useful test has been established in that the courts will consider whether the proposed amendment raises issues which could not be adequately litigated without resorting to evidence not within the scope of the original complaint.

See:

Kansas Gas & Electric Co. v. Evans (C. A. 10, 1938), 100 F. 2d 549, cert. den. 306 U. S. 665, 83 L. Ed. 1061;

Cyclopedia of Federal Procedure, Sec. 1848, p. 242.

Applying the relation back theory to the instant proceedings it is apparent that the independent violations of Section 8(a)(1) as set forth in paragraph 4 of the complaint, namely, the alleged statements of supervision, Mr. Osbrink's speech to the employees and the interrogation of employees as well as the other events relied on by the Board in claiming the independent violation of Section 8(a)(1) bear absolutely no relationship to the matters complained of in the original and amended charges. It cannot be said that the complaint, in so far as it pertains to the independent violations of Section 8(a)(1), is an amendment of or necessarily grows out of the violations of Section 8(a)(3) as are contained in the charges. It is difficult to perceive how the events surrounding the discharge of the employees can also be construed as bearing any relationship to the events which are urged as supporting the independent violations of Section 8(a)(1). The factual background underlying the alleged discriminatory discharges is entirely unrelated and independent of the factual background relied upon in finding the independent violation of Section 8(a)(1). Since the allegations in the complaint cannot be justified under the relation back theory, those allegations must stand alone when put to the test of compliance with the limitation provisions of Section 10(b). They cannot gain support in this respect from the fact that the charges alleging the discriminatory discharges did comply with these time requirements.

II.

Any Statements Which May Have Been Made by Derry Smith, or Other Alleged Supervisors, Cannot Under the Law and the Evidence Be Attributed to Respondent.

The Board's original case attempted to fix responsibility upon Respondent for certain statements alleged to have been made by Mose Harris, Detroit Rushing and Derry Smith. The Trial Examiner and the Board found that Mose Harris and Detroit Rushing were not supervisors and that their interests were not identifiable with management. It was held, however, that statements made by Smith were attributable to Respondent. The exact basis of that holding is not clear. It is stated first in the Intermediate Report [R. 34] that Smith exercised supervisory authority; it was then stated that he is properly identified with management [R. 35]; and it was also stated that the employees would properly make such identification [R. 35]. These three statements could, of course, involve different standards, but the evidence and the law do not support the holding upon any of them.

The evidence shows that Smith was referred to by Respondent as a journeyman shake-out man, having the same status as others referred to as journeyman molders [R. 402-403]. The term "journeyman" was intended to only designate the best man for the job [R. 166, 33]. The shake-out work consisted of the very simple task of shaking the sand from the molds into which the casting had previously been poured, and after the casting had cooled [R. 283]. The Board's decision refers to this shake-out work as a "department" and at the hearing some of the participants referred to it as a department. However, the term "department" is incorrectly used and it would

be more correct to refer to the shake-out "crew" rather than "department" [see R. 274]. As the journeyman shake-out man, Smith had the duty of not only performing normal shake-out work itself but also of instructing new employees and showing employees what to do, how to do it and when it should be done [R. 403, 267]. Smith himself testified that he had never fired or hired anyone and to his knowledge no one had ever given him any authority to do so [R. 408].

A supervisor is defined in the Act, Section 2(11), as a person having authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline employees or responsibly to direct them, to adjust their grievances or to effectively recommend such action *"if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."* There are many statements in the record that Derry Smith "transferred" employee's or that he "assigned" work, but there is not a word of evidence that such transferring or assigning was anything other than merely routine. There are also statements by the General Counsel's witnesses that Smith spent a substantial portion of his time "supervising." Such a term is a legal conclusion and the testimony of a witness that Smith "supervised" is worthless and is not probative evidence. The citations in the Board's brief in support of the contention that Smith was a supervisor are references to such testimony. Where the witnesses were specifically asked what they meant by the term "supervising," their explanation made it clear that the functions referred to were merely routine in nature, not requiring the use of independent judgment. Thus, witness Goynes testified for the General Counsel and on

cross-examination stated that Smith "was supervising" ninety per cent of his time. He was then asked what he meant by "supervising." He answered [R. 267] "showing the guys what to do, and what to do next, what bands to bring in, showing them how to get the sand and so on." Witness Monje said that Smith showed him what to do on the job, told him where to work, how to work and what to do [R. 223]. Witness Sanford testified that Smith showed him how to shake-out, where to find bands for the molders, how to go and get them and the size to get; he gave him instructions as to his job as a shake-out man [R. 257-258]. Witness LeFlore testified that Smith told him where he was to work, introduced him to the "fellows," showed him where various material which he would need was located, and showed him where to take cores to be sandblasted and heat treated. This was referred to by the witness and the General Counsel as "full and complete instructions" [R. 274].

If the court is to hold that such authority constitutes "supervisory" authority within the meaning of the Act, then we submit that ninety per cent of the Board's certifications of representatives are in violation of the Act since they would include supervisory employees. In every case these witnesses' testimony means nothing more than that Smith showed them what to do and how to do it and worked along with them leading the crew in a routine manner. There is not one act on the part of Smith which can be found anywhere in the record to indicate the necessity of independent judgment on his part. It is true that there was testimony that a foreman introduced a new employee to Smith with the statement that the employee was to take orders from Smtih. However, when the witness went on to describe the orders given by Smith

[see above references to record], it becomes clear that the orders were of a routine nature simply involving the function of leading a crew.

The Trial Examiner himself states that Derry Smith, as well as Mose Harris and Detroit Rushing, occupied a position analogous to "leadmen" [R. 33]. It is common knowledge that persons occupying such a position perform perfunctory and routine supervising work and are generally included in bargaining units certified by the Board. In short, they have always been considered as covered by the Act and not being a part of management. The General Counsel's witnesses who testified themselves called Smith a leadman in almost every case [R. 193-194, 232-235, 257, 272]. LeFlore was asked [R. 311] if he had ever heard Smith referred to as a supervisor and he answered "just referred to as leadman." While the witnesses sometimes use the term "boss" in referring to Smith, they used the term "leadman" equally as much and often used the two terms interchangeably.

In the case of *National Labor Relations Board v. Quincy Steel Cast. Co.* (C. A. 1, 1952), 200 F. 2d 293, the question was whether two employees classified as "coremaker and bench pouring boss" and "floor molder and assistant foreman" were supervisory within the meaning of the Act. Their work was at least more responsible than that of Smith in this case. Both the Board and the court held the employees to be non-supervisory occupying only the position of leadman despite their title. It was stated:

> "The Trial Examiner found 'that the pouring operation is a routine matter and while, as in practically every type of manufacturing process, there is a safety

> factor involved, the duties performed by Green and Dunn in this connection are not of such character as render them supervisors but rather, at best, leadmen of the pouring crews.' The legislative history of §2(11) tends to support the Board's view that certain employees with minor supervisory duties, such as straw bosses and leadmen, were not intended to be excluded from the coverage of the Act."
>
> *National Labor Relations Board v. Quincy Steel Cast. Co.,* 200 F. 2d 293, 296.

Mr. Rasp, Respondent's Superintendent, testified on cross-examination [R. 386-387] that while he considered Smith's judgment "pretty fair," he did not accept his recommendation on the men and that when Smith complained to him about an employee's inattention to work, Rasp would always check on it personally rather than accept Smith's judgment. He testified that Smith would complain to Rasp about some of the employees' work and that at times Rasp had asked Smith, in considering a pay raise, if an employee was "on the ball." Rasp's testimony is without contradiction or denial in the record. There is not any reason why Rasp should not be believed when he testified that Smith could not effectively recommend. Testimony as clear and unequivocal as Rasp gave on this point cannot be ignored.

It is clear that the rank and file employees (especially those allegedly intimidated by these so-called supervisors) considered Smith, Rushing and Harris to be one of themselves. In fact, LeFlore testified that Smith, Rushing and Harris were the principal "fellows" that he would talk to about the Union [R. 282]. Apparently LeFlore was attempting to convert Smith to his own way of think-

ing with respect to the Union, which certainly refutes the Trial Examiner's statement that "the employees would reasonably" identify Smith with management [R. 35]. Again, LeFlore testified [R. 310] that he removed a Union button "because my friends that were working around and working in there, *like Derry* and some of the other fellows," told him that he had better take it off because he would only be "intimidating" himself. The evidence contains other indications of the friendship of Smith with LeFlore and other rank and file employees. Also indicative of how the employees considered Smith is the fact that Smith went to see LeFlore at his home after he was discharged and was plainly sympathetic to LeFlore [R. 293-294].

We submit that there is not a word of evidence in the record to detract from the abundant indications therein contained that the employees considered Smith, Harris and Rushing as one of themselves and did not identify them with management. We further submit that, considering the record as a whole, the preponderance of evidence proves that Smith (as well as Harris and Rushing) at no time exercised any authority requiring the use of independent judgment. The record is devoid of any evidence that Smith could affect an employee's status, and the finding that Smith was a supervisor is one which is made squarely in the face of the preponderance of the evidence. The isolated statement in the Intermediate Report [R. 34] that Smith exercised "independent judgment" is without support or warrant in the record. While the Trial Examiner engaged in lengthy discussion on most of his conclusions, he does not refer to any testimony directly supporting that one, all important, statement.

Further evidence that Smith was considered as a rank and file employee is the fact that he was in the bargaining unit and voted in the election. It does not appear that his vote was challenged and this should now estop both the Board and the charging party from now questioning his status.

The last factor was considered as controlling on this question in the case of *N. L. R. B. v. Scullin Steel Co.* (C. A. 8, 1947), 161 F. 2d 143. The employees in question had at least higher authority than Derry Smith in the instant case, but yet were held not to be supervisory employees. The court stated:

> "The fact that *these employees were considered as eligible to vote at the election was tantamount to a ruling that they were not supervisory employees,* and they had a right to express their opinion at and prior to the election, and as their status was not changed that right continued subsequent to the election. It would be an anomaly to hold that they were employees entitled to vote for a representative, and then to hold that subsequent to the election respondent should be held liable for remarks made by them as to labor matters. These men may properly be characterized as key men, chosen for their ability from among the employees. It is not shown that additional compensation was paid them. They had no power to hire nor discharge. One was said to have the right to recommend the hiring of new men based upon his observation as to their competency. They were in no sense supervisory employees." (Emphasis added.)
>
> *N. L. R. B. v. Scullin Steel Co.,* 161 F. 2d 143, 149-150.

One of the leading cases of the Court of Appeals on this subject is that of *N. L. R. B. v. Arma Corporation* (C. A. 2, 1941), 122 F. 2d 153. The employees involved were referred to as "key men" or "straw bosses." In holding that they were non-supervisory, the court stated:

> "The key men were not supervisory employees in any proper sense, but were only an amorphous group of employees senior to small groups of from one to four apprentices or workmen junior in service to the key men, who were supposed to furnish leadership and advice to the juniors in a limited field. The key men, like the other workmen, were paid by the hour and received no additional compensation by reason of services rendered as key men as distinguished from their ordinary tasks, with the possible exception of a negligible bonus at Christmas. If such employees were not to be free to express their opinions and to urge fellow-workmen to organize in a certain way, the interest and activity of the most competent men in the appropriate bargaining group would be eliminated. The key men had no power to hire or fire apprentices assigned to them, or to recommend any of them for promotion. There was no evidence that the officers or supervisory employees consented that key men should represent the views of the corporation, or gave the other workmen reason to suppose that the key men worked for Independent in order to please Arma. If the latter had interfered with the labor activities of the key men, except to prevent canvassing during working hours, it surely would have been guilty of an unfair labor practice and would have deprived these men of rights guaranteed under Section 7 of the National Labor Relations Act, 29 U. S. C. A. §157."
>
> *N. L. R. B. v. Arma Corporation,* 122 F. 2d 153, 156.

The Board itself has generally held employees such as Smith to be non-supervisory. For example, in *In the Matter of The Solomon Company* (June, 1949), 84 N. L. R. B. 226, the Board held:

> "The Trial Examiner found the foreladies to be supervisors, on the ground that they had authority responsibly to direct other employees. In several recent cases, however, we have found individuals, although designated as 'foremen' or 'foreladies,' not to be supervisors within the meaning of the Act *where their relation to their fellow employees was that of master craftsmen to apprentices, and their regulation of the flow of work and the training of new employees was the result of superior experience rather than of authority.* The foreladies in the present case appear to us to be in the same situation. We therefore find that they are not supervisors within the meaning of the Act. On the record in this case we hold that the Respondents are not responsible for their activities in connection with the Union." (Emphasis added.)
>
> *In the Matter of The Solomon Company,* 84 N. L. R. B. 226, 227.

Also see *Kansas-Nebraska Nat. Gas Company, Inc.* (July, 1950), 90 N. L. R. B. 1423, wherein the Board held that chief operators were not supervisory employees and wherein their status was similar to that of the employees involved here.

Furthermore, the statements attributed to the alleged supervisors were indeed "straws in a haystack" when compared to the volume of conversation openly going on throughout the plant for a period of some months, and which even the Trial Examiner commented upon. The

totality of these statements is indeed lost in such a context, and it would seem that they would not be worthy of consideration in the light of the circumstances actually existing.

See:

N. L. R. B. v. Hinde & Dauch Paper Co. (C. A. 4, Dec., 1948), 171 F. 2d 240;

N. L. R. B. v. Hart Cotton Mills, Inc. (C. A. 4, July, 1951), 190 F. 2d 964.

The Trial Examiner apparently finds that one Watkins was also a supervisory employee. It may be that we are delinquent in our examination of the record, but careful search has failed to reveal a line of evidence upon which to base this finding of the Trial Examiner as set forth in the Intermediate Report, footnote 6 [R. 45]. Mr. Osbrink testified as to the managerial organization and described Watkins as doing Rasp's "legwork" [R. 459; 130]. Mr. Osbrink's secretary, in typing Respondent's Exhibit 3, indicated that Watkins was "assistant to Jimmy Rasp." Mr. Osbrink testified that he had told his secretary that she had made a mistake and that Watkins was not Rasp's assistant. The "assistant to Jimmy Rasp" was then stricken in ink and the words inserted "did Jimmy's legwork." Perhaps some point was made by the Trial Examiner of the fact that the writing was changed. If anything, it would seem that the admitted change would add credence to the fact that Watkins only did Rasp's "legwork" for if such was not the case, the document would not have been presented in the form in which it was. In any event, and whatever inference the Trial Examiner may have taken from this, we submit that there is no evidence anywhere in the record to support a finding that Watkins was a supervisor.

We submit that there is not substantial credible evidence on the record as a whole to support the finding that Smith and Watkins were supervisory employees of Respondent or that the rank and file employees considered them to be supervisorial or identified with management. The weight of the evidence manifestly supports the contrary finding.

III.

John L. LeFlore, Jr., and Archie Plummer Were Discharged for Cause.

A. John L. LeFlore, Jr.

LeFlore was originally hired by Respondent on September 16, 1951 [R. 270]. He was discharged January 15, 1952. The reason for his discharge was because of inattention to work, which included his activity of wandering around the plant talking to other employees without permission, which interfered with the work of others, and because he was careless in what work he did.

The Trial Examiner disagrees that such was the reason for his discharge and chooses to believe that he was discharged because of Union activity. The Board adopted his findings. The Trial Examiner's finding is not only without support of substantial evidence, but is, in fact, contrary to the weight of the evidence. In finding against Respondent, the Trial Examiner depends exclusively upon circumstantial evidence, with the exception of certain statements attributed to such alleged supervisors as Derry Smith.

He disbelieved Mose Harris, a rank and file employee, who testified as to LeFlore's disinterest and inefficiency in his work, simply because, according to Harris, LeFlore

was inefficient to the point of gross negligence, and the Trial Examiner could not believe that the Respondent would have as much patience as it did with an employee whose shortcomings were so great as those of LeFlore. Then the Trial Examiner reverses his measure in the same paragraph [R. 40-41] and discredits the testimony of another rank and file employee, Titus, because LeFlore's shortcomings, as described by Titus, were insufficient to warrant a discharge. Christensen, another rank and file employee and a Journeyman Molder, testified in great detail as to LeFlore's inefficiency and was peculiarly qualified to do so since he depended upon LeFlore in doing his own work [R. 426-429]. However, the Trial Examiner did not believe any of Christensen's testimony, apparently because Christensen testified that the molder (that is, himself) was the one held chiefly responsible for dirty castings and from which the Trial Examiner concludes [R. 41-42] that Christensen was simply blaming LeFlore in order to clear himself of responsibility. Another reason why the Trial Examiner apparently would not believe Christensen was because the latter had personal differences with LeFlore and one Goynes, and because Christensen "did not deny" that he had called Goynes a "nigger." Just what connection Goynes has in the Trial Examiner's mind with the matter involved here is not shown, but apparently he feels there is some connection between Christensen's failure to deny that he called Goynes a "nigger" and the credibility of his testimony with respect to LeFlore. The Trial Examiner then disposes of Christensen's testimony by assuming that Christensen's testimony was worthy of belief, but concluding that LeFlore had worked with Christensen for three weeks before Christmas of 1951, but had not been discharged until

January, 1952, so "obviously, therefore" [R. 42] the inefficiencies as outlined by Christensen had nothing to do with his discharge.

It should be noted that the testimony of Christensen, Harris and Titus was the testimony of rank and file employees who had no interest in the matter. By reasoning in a manner which ignores the realities of the situation, the Trial Examiner, with the Board's approval, has zigzagged through the evidence in such a manner as to avoid its effect. The Trial Examiner, in fencing himself off from the testimony of these credible witnesses by the use of hypertechnical standards, has run afoul of the Administrative Procedure Act and the National Labor Relations Act in that he did not consider all the evidence or find in accord with the weight of the evidence.

As a further example of this, the Trial Examiner points out every instance in which the General Counsel's testimony had not been denied or contradicted by Respondent, and apparently gives great weight to these. At the same time he fails to point out or give any weight to any instance wherein Respondent's testimony was not denied or contradicted by the General Counsel's witnesses. Yet, Mr. Rasp, Respondent's Superintendent [R. 348-349], testified that he many times had warned LeFlore about his shortcomings and although LeFlore was recalled to the stand only a few minutes after Mr. Rasp testified, he did not deny in any way Mr. Rasp's insistence that LeFlore had been warned by him, but this the Trial Examiner failed to note. The weight to be given his failure of denial is not measured by the failure to deny itself. Rather, the weight to be given to Mr. Rasp's testimony is determined in light of the fact that if Respondent was

of the mind to discharge LeFlore because of his Union activity, then obviously it would be utterly unreasonable for Respondent's Superintendent to repeatedly warn LeFlore of his shortcomings. Nor can it be contended that Rasp's testimony is not to be believed, since there is not one word of denial or contradiction in the record which could be fairly or reasonably pointed to as constituting a contradiction.

Mr. Rasp stated that he had personally observed, and was familiar with LeFlore's work [R. 352]. He stated that he personally had observed LeFlore [R. 353] and that he was not tending to his business, that he was chasing around the plant, not caring whether he did his work carefully or not, and bothering the employees [R. 353]. LeFlore was originally hired as a furnace man and was then transferred to the shake-out crew [R. 353]. Prior to his transfer Rasp testified that he had "called him down" (LeFlore) because of his conduct [R. 353-354]. After his transfer to the shake-out crew, Rasp still continued to observe his inattention to duty [R. 355]. He observed that he was still careless in his work, and that he got sand down the molds and his wanderings around the plant continued [R. 355]. Rasp testified he talked to him quite a few times and the molders were complaining to him that they had to shoulder LeFlore's work [R. 355]. After LeFlore's transfer to the shake-out crew, Rasp testified that he spoke to him "roughly half a dozen times or so" about his wandering away [R. 355]. He also spoke to him quite a few times about the carelessness in his work [R. 356].

On cross-examination Rasp testified that he had stood and watched LeFlore work, that he had been called there

to do so, and that this happened a couple of times a week at which times he would talk to LeFlore [R. 376-377]. Rasp also testified that he had seen LeFlore carelessly shift the molds and walk around them [R. 388]. He also stated that quite a few times he had seen LeFlore in other departments [R. 388].

When LeFlore went to the witness stand a few minutes after Rasp testified, he only denied that anyone had ever personally complained to him about getting sand in the molds [R. 493]. Moreover, he did not make any reference at all to Rasp's repeated testimony that he had warned LeFlore about his other shortcomings and no denial of that was ever made. LeFlore had testified weeks previously [R. 287] that none of the *leadmen* had ever made any criticism of his work. He clearly, however, was not including Rasp within that statement for at least we think it is clear that as Assistant Superintendent at that time he was in no way considered a leadman.

Derry Smith, whom the General Counsel contends was a supervisor over LeFlore, testified that LeFlore would leave the job and talk with other workmen; and that Smith had called this to his attention several times [R. 405]. He testified that this occurred about ten or twelve times while LeFlore was working with the shake-out crew [R. 405]. Harris, a Journeyman Molder, gave similar testimony [R. 442-443]. LeFlore was recalled to the stand shortly after this testimony from Smith and Harris, and despite the fact that he had, immediately prior to being recalled, heard these statements, he made no effort to deny them. He did, of course, deny [R. 495-496] that he had "a habit of wandering around in the plant when you weren't supposed to." However, he did not deny that

either Smith or Rasp had warned him about such wanderings on any occasion.

The Trial Examiner, in considering this uncontradicted and undenied testimony of Rasp [R. 43], was able to find reason to not believe it because of the *"undenied* and credible testimony" of LeFlore to the effect that Smith had directed LeFlore to break in Smith's brother who was a new employee. In other words, Rasp's and Smith's undenied testimony was discredited because Smith had not denied that he had told LeFlore to "break in" a new employee. The employees involved were performing common labor, and to have LeFlore show a laborer what the job required does not support the conclusion the Trial Examiner draws from it. Further reason to not credit Rasp's testimony seems to be the fact that Rasp "first testified that LeFlore was transferred to shakeout to 'snap him out of it' and then admitted that the transfer was made at LeFlore's own request" [R. 43]. The Board's opening brief (pp. 10, 25) seems to make much of this. To indicate the superficiality of the Examiner's consideration of Respondent's evidence and the highly technical standards by which he measured it we quote for the court's consideration the full testimony on which the Examiner's observation was based:

> "Q. (By Mr. Benedict): Now, at first he was on one of the furnace banks, wasn't he? A. He was a furnace man, that is, then we put him as a helper to see if we couldn't snap him out of it so he would be—
>
> Q. To what department was it that you put him on? A. Into the foundry as a shake-out man.
>
> Q. Did you place him in the shake-out department at his request or not? A. I think it was at his

request, that he had some reason to believe the work was easier, so probably that was the reason." [R. 353.]

There is nothing inconsistent with LeFlore's asking for a transfer, and the Superintendent granting it "to snap him out of it."

The Trial Examiner further points out, as casting doubt on the credibility of Respondent's witnesses [R. 43-44], the failure on their part to reveal any incident occurring immediately prior to LeFlore's discharge which could be said to have "touched off" the discharge. The Trial Examiner, in other words, assumes that all discharges are necessarily touched off in the same manner as an explosion; that is, that it is a spontaneous decision. He does not conceive that it could be a cumulative matter building up gradually over a period of time. Both Rasp and Smith while testifying that they were constantly warning LeFlore, were not able to recollect the dates such warnings had been given or what was the latest warning prior to the discharge. Their honesty is indicated by their inability to name the date on which they had last warned LeFlore. Cases could be cited wherein a Trial Examiner disbelieved a Company's witness because the Company's witness was *too specific* in just such matters as dates, times, and the content of conversation, and such "specificity" demolished their credibility. After going on at some length in such reasoning, the Trial Examiner then begins to speculate as to the reason of the discharge of LeFlore [R. 44] and observes that "A more likely explanation than any of those advanced by the Respondent" is that on January 2, 1952, the Board directed an election; whereupon he feels it must have become evident

to Respondent that the day of decision was reached, and that the time for drastic action was overdue. However, the Trial Examiner seems to have no difficulty with the fact that it was exactly thirteen days after the direction of election before LeFlore was discharged. We submit that such gratuitous speculation on the part of the Trial Examiner is not only a denial of due process and a fair hearing to this Respondent, but it is of such nature as requires that the entire Intermediate Report be stricken and another opportunity afforded Respondent to attempt to find a trier of facts who will fairly listen and impartially weigh the evidence and confine itself to fact.

We wish to point out very clearly that according to the witnesses which the Trial Examiner believed, the conduct of LeFlore in supporting the Union was overt, manifest and unconcealed almost from the day of his employment. The Trial Examiner stated that the election was discussed freely in the plant [R. 37], and it is clear that LeFlore expressed his support for the Union repeatedly to persons whom the Trial Examiner found were supervisors, and to a number of others whom the General Counsel contended were supervisors [R. 45]. The Trial Examiner concludes that LeFlore's support for the Union was so active that Respondent must have been advised concerning it. If that is true, the Trial Examiner fails to accord any weight to the fact that Respondent retained LeFlore in its employment for four months while LeFlore was expressing such overt support for the Union; and through a period of time when it is undenied that he was repeatedly warned by Rasp and Smith to give better attention to his work and to stop wandering around the plant.

In considering the evidence relating to LeFlore's discharge, the Examiner gave the first five pages of the Record [R. 39-44] to explaining why he does not believe Respondent's testimony. He then concludes in approximately one page [R. 44-45] that the discharge was because of Union activity. Other than disbelieving Respondent's witnesses, the only matters on which the decision seems based are:

(a) LeFlore was the most active in support of the Union;

(b) Since his activity was open, there can be "no doubt" that Respondent was advised concerning it; and

(c) Respondent had a strong bias against a bargaining relationship with the Union.

From these the Examiner concluded that LeFlore's Union activity was the reason for his discharge.

After coming to that conclusion the Examiner remarked that he was "strengthened" in this conclusion by certain statements of Watkins and Smith to the effect that LeFlore's discharge resulted from Union activity. Indeed, such a conclusion could not be based upon those statements since the evidence would not indicate that Smith or Watkins were speaking of their own knowledge. So far as appears, their alleged statement as to the reason for LeFlore's discharge was no more than their own speculation. As also indicative of an unlawful motive, the Trial Examiner then pointed to the Respondent's "reluctance" to afford LeFlore any explanation for the discharge. It appears that Watkins, who notified LeFlore of his discharge, told LeFlore that Rasp, the plant

superintendent, had told Watkins to inform LeFlore that he was discharged and to give him his pay check. LeFlore, unable to find Rasp, found Mr. Osbrink, and Mr. Osbrink advised him that he did not know anything about Mr. LeFlore's discharge and referred him to the plant manager [R. 285-286]. Mr. Beals had no information on the matter either but said that he would find out for LeFlore [R. 286]. LeFlore called the plant manager the following day and was advised that the manager had as yet been unable to contact Mr. Rasp. Later the same afternoon LeFlore called against and the manager told him that he had been discharged and told him the reason for his discharge [R. 486]. This evidence should be weighed in the light of the fact that LeFlore was a laborer who undeniedly had been warned by Rasp, the superintendent, on many occasions as to his shortcomings. In those circumstances there could hardly have been any substantial question in LeFlore's mind as to why he was discharged and, realistically appraised, there is no basis for the Examiner's observation with respect to the "reluctance" of Respondent to inform LeFlore as to the reason for his discharge.

B. Archie Plummer.

Archie Plummer was first employed by the Respondent in June 1951, as a metal pourer [R. 311]. He was discharged on February 29, 1952 [R. 323]. The Labor Board election had previously been held on January 25, 1952 [R. 10]. The reason for his discharge was because he was lax and unsatisfactory in the discharge of his duties, and his attendance and punctuality had been unsatisfactory for several months prior to his discharge [R. 357-358, 477-478]. The Trial Examiner has found

that the reason Respondent discharged Plummer was because of his Union activities. This finding lacks the support of substantial evidence and a finding to the contrary is the only one that would have such support.

In order to reach his finding as to Plummer's discharge the Trial Examiner is forced to rely on his previous finding that Watkins was of managerial status [R. 49], which is clearly an erroneous finding as pointed out under point II of his brief. In that connection the Examiner points out [R. 49] that Watkins is listed on Respondent's "management chart as assistant to Foundry Foreman Rasp." The statement is manifestly incorrect. There was no "management chart" put into evidence or even described. The Examiner may be referring to a scrap of note paper used by Mr. Osbrink to refresh his recollection in testifying. His secretary had typed a list of management personnel with their titles, and beside Watkins' name had typed "assistant to Jimmy Rasp." Mr. Osbrink had told his secretary that the description of Watkins was not correct, and had her mark it through and add in longhand, "Did Jimmy's Leg Work" [R. 457-459, 470-472; also see R. 130]. The Examiner thus ignores the witness' sworn testimony and chooses to say that Watkins was listed on this note paper as "assistant" to Foundry Foreman Rasp—thereby accepting the statement of the secretary who typed it, and who gave no testimony with respect to it. The Examiner thereby rejected sworn testimony on the basis of hearsay. The Board adopted his finding. In fact, the Board's supplemental decision, footnote 4 [R. 104], in answer to our contention that there was not a line of evidence to support the finding that Watkins had supervisory status, said, "However, R. H. Osbrink included Watkins' name

in a list of top management personnel." The Board pointed to no other evidence, and we submit that its conclusion draws more from this scrap of note paper than is there, at least so far as concerns Watkins who was described on the paper as "Did Jimmy's Leg Work."

Moreover, in finding that Palmer was not discharged for cause the Trial Examiner has, as in the case of LeFlore, failed to consider the testimony of Walker, Mose Harris and Jimmy Rasp. The basis upon which the Trial Examiner rejects the testimony of Harris and Rasp is not sufficient. Harris' testimony was discredited for the same general reasons as in the case of LeFlore [R. 51]. Rasp's testimony to the effect that he had personally observed Plummer's deficiencies, that he had authorized his discharge, and that Plummer had been discharged for inattention to work and abstenteeism [R. 357-358], was discredited apparently because the Examiner felt that certain contradictions in his testimony made it useless. The contradictions which the Trial Examiner attributes to Rasp's testimony are not present in the magnitude that he makes it. It is obvious that the witness was confused and we do not deny it. It is equally obvious that confusion (and not contradiction) is the explanation of the matters pointed out by the Trial Examiner. Indeed, some of the matter which the Trial Examiner points out as being contradictions can be construed as such only by distortion of plain meaning. Thus, the Trial Examiner sets forth quotations from Rasp's testimony containing the alleged conflicts and contradictions [R. 52-54]. He points out that Rasp "first testified that he himself authorized Plummer's discharge." He then sets forth the witness' testimony in two statements.

The first was, "I personally authorized * * * his discharge." He then sets forth another statement which was, "I did not discharge Archie Plummer." There is no contradiction or conflict in those two statements. To authorize a discharge implies only that the person did no more than authorize and did not himself carry it out. The two statements are consistent and the implication that there was a contradiction is unjustified.

The Trial Examiner also quotes Rasp's testimony to the effect that he did not know, at the time Plummer was discharged, that he had been an observer for the Union in the election, that he knew it after the election but not when he had dismissed him. Of course, the discharge occurred on February 29 and the election was January 25, and the witness was confused as to which had occurred first. The portions of the evidence which the Trial Examiner did not quote in his Intermediate Report are revealing as to the nature of the confusion, and cannot fairly be left unnoticed:

> "Trial Examiner Spencer: Read the question—read the answer, Mr. Reporter.
>
> (Answer read.)
>
> Trial Examiner Spencer: What do you mean by that?
>
> The Witness: Well, he was—
>
> Trial Examiner Spencer: I just want to know what your answer means, that you found out after this election we had.
>
> The Witness: He was a witness of the counting of the votes and I was also a witness. That way I connected the gentleman with the union.
>
> Trial Examiner Spencer: Is that what you meant by your answer?

The Witness: Yes.

Q. (By Mr. Reiner): He was a witness at the counting of the votes concerning the election? A. Yes.

Q. So that it was at that time that you discovered that he was the observer for the union? A. Yes." [R. 360-361.]

The witness therefore testified that he was aware on the day of the election that Plummer was a "witness" of the counting of the votes since he also was such a witness. The use of the word "observer" by the cross-examiner and the word "witness" by Rasp is a difference in terminology which explains much of the confusion. Indeed, there is a difference under the Board's rules of who is an observer and who may witness the counting of ballots, and the Trial Examiner himself confused the two by erroneously stating in his decision that Rasp served as the Respondent's observer at the election [R. 52]. Respondent was not the observer although he was a witness to the counting of the ballots. (See Certification On Conduct of Election bearing signatures of observers [R. 10].)

The quotations from the record in the Intermediate Report also omit the following observation which we think should be considered in evaluating the nature of the confusion:

"Trial Examiner Spencer: I don't think the witness has your question firmly in mind, apparently." [R. 361.]

The questions were then rephrased and the witness acknowledged [R. 362] that he had mistakenly confused

the order of dates between Plummer's discharge and the date of the election.

The Trial Examiner then quotes excerpts to the effect that the witness did not discharge Archie Plummer. He was then asked if he knew anything about the discharge of Archie Plummer, to which he answered "No, not exactly when that happened." This excerpt, lifted from the context from which it was made, is utterly unfair. The word "that" in the answer just quoted did not refer to the discharge of Plummer as such. It referred to a telegram [Union Ex. 2] which the cross-examiner was showing the witness and the witness meant that he didn't know anything about the sending of the telegram. At the expense of overburdening this brief with such detail, we wish to quote in italics the material which places the testimony in proper context and follow that with the excerpt quoted by the Trial Examiner to illustrate that the Trial Examiner considered the testimony out of context:

> "Q. *I show you Union's Exhibit No. 2. Did you give orders to send out that telegram?*
>
> Mr. Benedict: *Objected to as not proper cross-examination. It was not discussed on direct examination.*
>
> Mr. Nutter: *It goes to the reasons for his discharge. This is one of the issues in the case.*
>
> Trial Examiner Spencer: *Well, I will let him answer. You may answer.*
>
> The Witness: *I don't believe I was directly responsible for this. I think that Clary Tarrant was. I am not sure.*
>
> Q. (By Mr. Nutter): Did you tell Clary Tarrant that you discharged Archie Plummer? A. I did not discharge Archie Plummer.

Q. Do you know anything about the discharge of Archie Plummer? A. No, not exactly when that happened.

Q. Pardon? A. *Not exactly when that happened.*

Q. *Then you didn't know why he was discharged, is that right?* A. *I know why he was discharged.*

Q. Did you tell anybody to discharge him? A. Not actually.

Q. Who did discharge him? A. Clary Tarrant.

Q. Did he talk to you about it? A. Yes, he did.

Q. *Do you remember whether he said anything about sending him a telegram?* A. *No, I don't believe there was any telegram mentioned.*

Q. *Did he say anything about no more work available?* A. *I don't remember.*

Q. *You see what the telegram says, 'No more work available. Please bring in badge and pick up checks?'"* (Emphasis added.) [R. 390-392.]

The exhibit shown the witness was a telegram notifying Plummer of his discharge [R. 339]. In common parlance the notice of discharge is often called "the discharge." A fair appraisal of this testimony will not afford any basis for a conclusion that Rasp said he didn't know anything about the discharge. The excerpt when fairly construed clearly means that he did not know anything about the sending of the telegraphic discharge notice.

The Trial Examiner then quotes the questions as to whether Clary Tarrant was working "at the time Mr. Plummer was discharged," to which the witness answered that he believed that Tarrant "wasn't there." The Trial Examiner in a discussion preceding this quotation [R.

52] points out that Rasp admitted that he was not certain if Tarrant "was in Respondent's employ at the time of Plummer's discharge * * *." This was not the witness' statement. The witness only said that Tarrant was not working at the time Plummer was discharged. The statement does not afford a conclusion that the witness meant that Tarrant had left Respondent's employ. The statement could well mean that Tarrant was simply not working on the day that Plummer was discharged. At the conclusion of these excerpts the Trial Examiner points out that, "Obviously, no reliance whatever" can be placed on Rasp's testimony. We agree that Rasp's testimony must be weighed in the light of the fact that he was confused as to certain objective facts such as the sequence of events and the identity of persons with whom he talked. Confusion as to objective fact cannot justify a Trial Examiner's action in discrediting all of the witness' testimony on which he was not confused and on which he was not contradicted. Thus, if we take our attention from the witness' confusion over these objective facts which hardly seem important, it is obvious that the witness still testified without confusion and contradiction, that he authorized the discharge of Plummer, that he did so because of Plummer's inattention to duties, poor work record and his absences without permission, and that he had not been discharged because of his Union activity [R. 357-358, 362].

In comparison to the Examiner's treatment of Rasp's testimony, we should observe how he explains away inconsistencies in the testimony of Plummer [R. 49, footnote 8]. Thus, Plummer testified that his absence was authorized by Watkins and he testified that it was authorized by Walker. The Trial Examiner explained this by saying,

"He obviously was referring to the fact that Watkins was standing close by and in what he thought was hearing distance when Walker gave his consent." That statement by the Trial Examiner can be appreciated only in light of the knowledge that Walker flatly denied that he had had any such conversation with Plummer. We do not mean that the Trial Examiner's explanation of Plummer's confusion is not justified. We only mean to illustrate that if the Trial Examiner applied the superficial and hypertechnical standards of examination which were used in the testimony of Rasp, he would as easily have discredited the testimony of Plummer. Indeed, if we are to use such standards there is no credible evidence anywhere in this record.

The Trial Examiner concluded as to Plummer [R. 54-55] that he was discharged because of his Union activity. As in the case of Le Flore, the Trial Examiner states his conclusion and the evidence supporting it in approximately one page of the record, after devoting the preceding several pages to explaining why he did not believe the Respondent's evidence. The reasons which the Trial Examiner seems to give for his conclusion are: (a) Watkins did not testify; (b) Rasp's testimony was so confused that it can be ignored; (c) this leaves only Plummer's testimony as to the actual circumstances attending the discharge.

From these "and in the light of this record" the Examiner concluded that the only reasonable inference that could be drawn was that Plummer's partial absence on the day of his discharge was a pretext to cover the real cause—his advocacy of the Union both before and after the election.

The testimony of Plummer, referred to by the Examiner, was to the effect that on the day he was discharged he had reported for work late but that this had been pursuant to permission granted by Walker, his leadman [R. 320]. When Watkins questioned him about his tardiness Plummer testified that he answered that he had told Walker he was going to be late and that he (Watkins) had been standing nearby. He testified he had asked Watkins if he had not overheard the discussion with Walker [R. 320]. Walker flatly denied that Plummer had ever asked him for permission to be tardy, or that he had ever given such permission [R. 483]. Watkins, whom Plummer alleges overheard this conversation, was present in the hearing room and his presence was pointed out to the General Counsel by counsel for the Respondent, but the General Counsel declined to call Watkins [R. 501]. The Trial Examiner had previously pointed out [R. 50] that he was unable to credit Walker's denial "in the absence of corroborative testimony from Watkins." In the case of a conflict of testimony such as occurred between Walker and Plummer, the Trial Examiner could properly credit either witness and, indeed, it is his responsibility to do so where the conflict is relevant. However, the Examiner here did not make a decision as to credibility between Walker and Plummer. He merely decided to disregard Walker's testimony since it had not been corroborated by that of Watkins. This is not a proper standard to credit the testimony of witnesses and it obviously ignores the fact that the burden of proof is upon the General Counsel and not upon the Respondent. Watkins was not employed by Respondent at the time of the hearing [R. 130].

There was other evidence which the Trial Examiner and the Board wholly failed to consider. Thus, Plummer testified that commencing in November, 1951, when he became interested in the Union, he openly supported the Union [R. 322-323]. The Trial Examiner himself remarked that Plummer had been open in his interest in Union representation, even in the presence of those whom the General Counsel contended were supervisory employees [R. 48]. In the case of LeFlore, the Trial Examiner reasoned that since LeFlore had been open in his support of the Union, the timing of his discharge, shortly before the election, was evidence that the discharge was for Union activity. The same reasoning as applied to Plummer would lead to the conclusion that his discharge was *not* for Union activity since he also was openly in support of the Union, and he was not discharged until over a month following the election. At the time of Plummer's discharge, unfair labor practice charges with respect to LeFlore and others had been filed. The Union had lost the election and it would hardly seem reasonable that in such a context the Respondent would discharge other employees to discourage Union activity. It must be remembered that with the Union having lost the election, Union representation was foreclosed for at least a year since the Act prohibits the holding of more than one election during that period of time.

Also, the Examiner did not consider Respondent's Exhibit 1 which was a document signed by Plummer to obtain unemployment compensation and on which he stated the reason for his discharge as being "not calling in when off from work." He also gives no consideration to Respondent's Exhibit 2, the medical report, with respect

to an injury received by Plummer on January 14. On February 5, 1952 the doctor treating Plummer made the notation "able to return to work." However, Plummer did not return to work until seven or eight days later [R. 326-327].

The testimony of Walker, Plummer's leadman, to the effect that Plummer had a habit of wandering away from his job and that he, Walker, had warned him that he would lose his job for such conduct was referred to by the Examiner but he apparently gave it no weight.

Also ignored by the Examiner in rejecting the Respondent's contention that the reason for Plummer's discharge was, in part, based upon his absenteeism and tardiness, was the testimony that the Respondent had the policy of discharging employees for absenteeism or tardiness only after taking into account their record for cooperation, quality of work and application [Tr. 165-166]. Thus, the absentee record of other employees which was put into evidence becomes of aid only in the light of that policy.

The conclusion of the Trial Examiner with respect to Plummer is based not upon probative evidence, but is essentially based upon the failure of Respondent to call Watkins as a witness and upon the Trial Examiner's own disbelief of Rasp. Indeed, his opinion virtually admits as much [R. 54-55]. The conclusion with respect to Watkins is improper for it ignores the fact that the General Counsel has the burden of proof. The conclusion with respect to Rasp is baseless for the disbelief of a witness, even if the disbelief is justified, may never be considered as affirmative evidence to the contrary of that which was not believed.

C. Conclusions With Respect to the Discharges.

Congress, in enacting the 1947 amendments to the National Labor Relations Act, gave clear evidence that the Board had gone too far under the label "expertness" in the inferences drawn from evidence and in making findings. The inclusion in the amended Act of requirements that the Board's finding be supported by substantial evidence and that the findings be based upon the evidence in the record as a whole have been interpreted by the courts as a mandate to them to exercise a more strict scrutiny in reviewing the Board's findings.

Universal Camera Corp. v. N. L. R. B. (1951), 340 U. S. 474, 95 L. Ed. 456.

The courts have, accordingly, enlarged its function in reviewing findings of the Board. Indeed, this court was one of the first to state that it would require the Board's findings to be supported by substantial evidence on the record as a whole, and this was held even before the amendments.

See:

N. L. R. B. v. Union Pacific Stages (C. A. 9, 1938), 99 F. 2d 153.

The recent case of *United Packinghouse Workers v. N. L. R. B.* (C. A. 8, Feb. 1954), 33 L. R. R. M. 2530 (as yet not officially reported) is very much in point. The court had before it the question of whether the Board's finding that certain employees were illegally discharged was supported by substantial evidence. In holding that they were not so supported, the court made the

following statements which are equally applicable to the instant case:

> "As has been observed the burden of proof to establish affirmatively by substantial evidence that the discharges or refusals to reinstate were because of union membership and activities and for the purpose of discouraging membership in the union was upon the Board and this burden at no time shifted to the company. The fact that the employer may introduce evidence tending to show other reasons for discharge or refusal to reinstate does not mean that the employer has the burden of proof of establishing such alleged cause but the evidence is admissible and pertinent because it tends to disprove the allegations of the complaint. But whether such evidence be introduced or not it is still the duty of the Board to prove the allegations in the complaint by substantial evidence. There was evidence tending to prove that each of these employes, save five discharged for other reasons, participated in unprotected activities during the strike. True, the trial examiner found the evidence insufficient to sustain that charge. He did so by discrediting positive testimony in many instances and by crediting the negative testimony of the employee. The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of the employer was corroborated in most instances by the surrounding facts and circumstances, convinces us of his bias and hostility.
>
> * * * * * * * *
>
> "The manifest prejudice, bias and hostility of the examiner as disclosed by an examination of the rec-

ord goes far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts. A study of the entire record indicates that this bias and hostility prevailed not only in the weighing of the evidence but in the ruling of the court in rejecting pertinent evidence offered by the company.

* * * * * * * *

"Since the decision of the Supreme Court in Universal Camera Corp. v. N. L. R. B., 340 U. S. 474 . . ., it is incumbent upon this court in cases here on petition for review of an order of the National Labor Relations Board to consider the conflicting evidence and if it is our duty to consider it then we must pass upon its weight."

United Packinghouse Workers v. N. L. R. B., 33 L. R. R. M. 2530, 2532, 2533.

The Trial Examiner in the last cited case had not placed the burden of proof upon the employer expressly, but his method of examining the evidence had done so in effect. In the instant case the Trial Examiner has done the same to an equal degree.

Another case to the same effect is *Indiana Metal Products Corp. v. N. L. R. B.* (C. A. 7, Mar. 1953), 202 F. 2d 613. The court there stated:

"The burden was on the General Counsel of the Board to prove affirmatively, by substantial evidence, that Meyer's discharge was due to union activities. N. L. R. B. v. Reynolds International Pen Co., 7 Cir., 162 F. 2d 680, 690; Interlake Iron Corp. v. N. L. R. B., 7 Cir., 131 F. 2d 129, 134. In the latter case, this court, in an opinion by Judge Minton, said, 'The company does not have to prove nondiscrimination

because of union activities. The Board must prove discrimination because thereof. This burden of the Board to prove discrimination and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board. [Citing.]'

* * * * * * * *

"The Board's decision states, 'Like the trial examiner, we are not convinced by the explanation offered by the respondent for Meyer's discharge.' The Board's approach seems to be that the burden of proof was upon the company."

Indiana Metal Products Corp. v. N. L. R. B., 202 F. 2d 613, 616, 617.

The *United Packinghouse Workers* case and the *Indiana Metal Products Corp.* case seem to also support the proposition that the Trial Examiner's disbelief of the reason given by the employer for the discharge not only does not shift the burden of proof to the employer—it also does not constitute evidence, even of a circumstantial nature, that the reason for the discharge was one which would make it illegal.

In *Hazel-Atlas Glass Co. v. N. L. R. B.* (C. A. 4, Mar. 1942), 127 F. 2d 109, the court said on that precise point:

"There was no direct evidence that the complainants were discharged for union activities. All the direct evidence was to the contrary; and the Board reached its conclusions by rejecting the direct evidence as false and by drawing certain inferences from the evidence that remained. It is the sufficiency of the latter evidence that must now be considered, for it is obvious that the mere rejection of the em-

ployer's denials as perjury does not take the place of affirmative evidence of wrong doing."

Hazel-Atlas Glass Co. v. N. L. R. B., 127 F. 2d 109, 114-115.

The court in the *Indiana Metal Products Corp.* case also held (at p. 617) that "timing" of a discharge in relation to other events was not evidence. In the instant case the timing of LeFlore's discharge as being subsequent to the direction of election was considered as being "a more likely" reason for the discharge.

The Trial Examiner's finding with respect to Plummer's discharge is wholly dependent upon the failure of Watkins to be called as a witness. To attribute such weight to the failure to call a witness is in effect to place the burden of proof upon the Respondent. In *N. L. R. B. v. Ray Smith Transport Co.* (C. A. 5, 1951), 193 F. 2d 142, the court was confronted with the same finding. The General Counsel's witness testified to a certain conversation with one Hillin who apparently had some connection with the employer and who was not called to deny or explain the conversation. The Trial Examiner indicated that since the respondent had not offered Hillin to dispute the testimony it should be taken against him and to the effect that if Hillin had testified he would have supported the testimony already given. In rejecting this method of analysis, the court stated:

"We know of no principle on which such a ruling could rest, except the principle of suspicion and conjecture and the willingness to believe the worst of one against whom a charge has been made."

N. L. R. B. v. Ray Smith Transport Co., 193 F. 2d 142, 145.

The testimony of rank and file employees who have no apparent interest at stake was completely ignored by the Trial Examiner. Thus, the testimony given by Mose Harris, Uries Walker, Clifford Christensen and Columbus Titus, as well as by Derry Smith and Jimmy Rasp, was all discredited upon one basis or another. Most of the rejected testimony was without conflict or contradiction. The sworn testimony of witnesses cannot be so lightly tossed aside. The ease with which the Trial Examiner did so is the measure of the consideration he gave it. In doing so he does not fairly consider the evidence nor does he consider it "as a whole." While it is the function of the Examiner to weigh the evidence and credit one witness' testimony as against the other, the courts have consistently held that this does not give him license to ignore.

In *N. L. R. B. v. Russell Mfg. Co.* (C. A. 5, Sept. 1951), 191 F. 2d 358, the court said:

> "Such sworn testimony cannot be arbitrarily disregarded on the assumption that he was lying."
>
> *N. L. R. B. v. Russell Mfg. Co.,* 191 F. 2d 358, 360.

In *American Smelting & R. Co. v. N. L. R. B.* (C. A. 8, Mar. 1942), 126 F. 2d 680, the court said with reference to the Board's refusal to accept the testimony of the employer's superintendent:

> "There must be impeachment of him, or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point."
>
> *American Smelting & R. Co. v. N. L. R. B.,* 126 F. 2d 680, 688.

Finally, the Trial Examiner's finding is supported in his mind by certain statements concerning the discharge made by those alleged to be supervisors. The weight the Trial Examiner gives those statements cannot be approved, even if it were true that they were made by supervisory employees. The evidence is clear that if they are supervisory employees they are only technically so, and not the type employee who would normally be assumed to have authority to speak for the employer or to have actual knowledge of the reason for the discharge. Statements made by such employees are not entitled to weight because there is no evidence that they were doing any more than voicing their own speculative opinions. This means the findings are based upon incompetent evidence. In *Pittsburgh S. S. Co. v. N. L. R. B.* (C. A. 6, Feb. 1950), 180 F. 2d 731, affirmed (1951), 340 U. S. 498, the court made the following observation:

> "Certain wholly incompetent testimony was admitted to the effect that Shartle was discharged because of union activity. After his discharge Shartle talked to the men on the ship, the electricians, the firemen, the oilers, the coalpassers, the steward, the second cook, the porter, the deck hands, the deck watch, and the watchmen, and asked them whether he was competent. He said they assured him that he was, and that he was discharged for union activity. Reading the case in the light of the whole record, we conclude that Shartle was discharged for cause and that the finding that he was discharged because of union activity is not supported by reliable, substantial, and probative evidence."
>
> *Pittsburgh S. S. Co. v. N. L. R. B.,* 180 F. 2d 731, 740-741.

IV.

The Proceedings Were Not Conducted in Accordance With the Requirements of Law.

Much that has already been said with respect to the Intermediate Report could be repeated here and cited as a denial of due process as well as evidence of partiality and bias. We mention only a few of these with but brief discussion.

The real evidence upon which the Trial Examiner acted was not the evidence appearing on the record but the reaction in his own mind from his disbelief of Respondent's witnesses. This is illustrated by his discrediting Christensen's testimony because (among other reasons) Christensen had not denied that he had called a third party, in no way connected with the proceeding, a "nigger." This reference by the Trial Examiner is nothing less than astounding. He uses the failure to deny as evidence of the matter not denied. Further evidence of the Trial Examiner using an intangible suspicion as evidence was his manner of resolving the conflict between Walker and Plummer. The Examiner made it clear that he was believing Plummer not because he credited Plummer over Walker, but solely because Watkins had not testified. In that context the failure to call the witness is not evidence and, if nothing else, it does not observe the requirement that the burden of proof is upon the General Counsel.

The Trial Examiner also based his conclusions upon wholly incompetent evidence. Some of the instances in which the Trial Examiner did so are so extreme in nature that they indicate willingness to use any type of evidence against Respondent. Thus, there is a conflict as to whether or not Derry Smith had stated to employees that Mr.

Osbrink had told him he would close the plant if the Union won the election. The Examiner states that while Smith denied the statement, other witnesses, who convinced the Trial Examiner, testified that he had made the statement,

> ". . . and that such a statement was made is further confirmed by the fact that the Union caused to be distributed circulars in which the employees were told that the Respondent could not close its plant even if it chose to do so because of the nature of the defense contracts under which it was operating." [R. 35-36.]

Thus, we have here a finding based upon the most obvious type of hearsay. A handbill distributed by a Union in an election campaign is used by a Trial Examiner to prove the truth of the statements made in the handbill; and in the particular instance to prove that Derry Smith had made the statement that Mr. Osbrink would close the plant if the Union won the election. However uninformed an Examiner may be as to the technical rules of evidence, any layman could not consider himself as fairly deciding a case if he uses campaign literature as evidence. A further astonishing feature of this is the fact that the handbill had been rejected as evidence at the hearing. Indeed, the Respondent offered a series of Union handbills as Respondent's Exhibits 5-A through 5-T. It was stipulated that these handbills were distributed at the Respondent's gates by authorized representatives of the charging Union on the dates indicated on each of them [R. 487]. They were offered to show the entire atmosphere and context surrounding the plant at the time of the election in order to better interpret the employer's

conduct which was in question [R. 488-491]. The offer was rejected by the Trial Examiner. When he came to decide the case the Trial Examiner apparently examined these rejected exhibits and decided to admit the one containing the statement with respect to Respondent's ability to close down the plant. Such was not the purpose for which it had been offered, and the Trial Examiner was thus admitting on his own motion a portion of the evidence previously offered by Respondent and for a purpose other than Respondent had offered it and, in fact, as evidence against Respondent. Apart from the obvious incompetence of the exhibit, for the purpose the Trial Examiner admitted it, the procedure which resulted in his admitting this single handbill is not only contrary to all rules of procedure, but it is not even in accord with common rules of fairness. Again, this is important not only as an instance in which the Trial Examiner made an improper evidentiary and procedural ruling, but by the nature of his error is evidence that he was not impartially deciding the matter.

As further evidence of the Trial Examiner's bias, we point to the method by which he has zigzagged through the record so as to pick up the evidence which he wants and so as to ignore the evidence which he does not want. He in part accomplishes this by using a different measure in weighing the evidence of one witness as compared to another and in judging one incident as compared to another. Thus, the timing of the election was an important measure in the Trial Examiner's mind proving the illegality of LeFlore's discharge. The same measure which would have indicated that Plummer's discharge was legal was not even considered. This is further evidenced by the Trial Examiner's making no reference to the many

instances in which Respondent's testimony was not denied by the General Counsel's witnesses and by consistently pointing out every failure by Respondent to deny the testimony of the General Counsel's witnesses. Further evidence that the Trial Examiner picked his evidence rather than fairly considering all the evidence as a whole is his discrediting of all Respondent's testimony even where it was not contradicted or denied. As in the case of Rasp, this was achieved in some instances by the Trial Examiner pointing to certain contradictions within the witness' testimony which either were not present at all or which are present only upon a nonrealistic interpretation. At the same time, the Trial Examiner points to no inconsistencies in the testimony of the General Counsel's witnesses except in one case where he explained it with an explanation more his own than the witnesses' [R. 49, footnote 8].

A further violation of the procedural requirements for a fair and impartial hearing is the fact that the Trial Examiner found conduct illegal which could not have been fairly considered to be within the contentions made by the General Counsel. Thus, the Trial Examiner finds that the withholding of pay checks on the day of the election was an interference with the election [R. 38]. This was not alleged in the complaint. He also found as unfair labor practices alleged statements by Smith and Watkins that LeFlore would not be rehired since he had been seen passing out Union pamphlets and other statements to the effect that LeFlore had been discharged for Union activity. The complaint alleged neither of those statements. The General Counsel never stated that he contended that they were violative of the Act or that they were within the purview of the complaint. These specific statements were mentioned casually in the testimony of

some of the witnesses and were not pointed to as being the matter which the General Counsel was trying to prove. No attention was given these statements by Respondent since it was not understood that they were involved as independent violations of the Act. The finding in the Intermediate Report that they were violations of the Act was the first knowledge that the uttering of such statements were even involved. One of the most basic requirements to a fair hearing is that the Respondent be fairly informed of just what alleged violations are involved. That has not been done here. It was stated in *N. L. R. B. v. Bradley Washfountain Co.* (C. A. 7, Nov. 1951), 192 F. 2d 144:

> "Of course anyone charged with violation of the law is entitled to know specifically what complaint he must meet and to have a hearing upon the issue presented, and, were what we have said in this respect the only factual or legal question involved, we would necessarily agree with respondent's position. There is a denial of procedural due process of law when the issues are not clearly defined and the employer is not fully advised of them. Consolidated Edison Company of New York v. N. L. R. B., 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126."
>
> *N. L. R. B. v. Bradley Washfountain Co.,* 192 F. 2d 144, 149.

See also:

N. L. R. B. v. Reliable Newspaper Del. (C. A. 3, Feb. 1951), 187 F. 2d 547;

In the Matter of West Fork Cut Glass Company (July 1950), 90 N. L. R. B. 944;

In the Matter of Starrett Brothers and Eken, Incorporated (Jan. 1951), 92 N. L. R. B. 1757.

The Intermediate Report comes clearly within the rule of *Del E. Webb Const. Co. v. N. L. R. B.* (C. A. 8, May 1952), 196 F. 2d 841, where the court pointed out that there was no strong convincing link between the particular fact found and the conclusion drawn from it (p. 846) and emphasized that the evidence cannot be viewed piecemeal, as the Examiner attempts to do in this instance, but must be viewed as a whole, saying:

> "To see if the evidence sustains this finding we must examine the record as a whole, considering not only the evidence tending to support the finding but also the evidence militating against that finding. §10(e) of the Act; 29 U. S. C. A., §160(e). Universal Camera Corp. v. National Labor Relations Board, 340 U. S. 474, 71 S. Ct. 456, 95 L. Ed. 456.
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> * * * * * * * *
>
> "The evidence relied on to support the finding consists of suspicions, unfounded conclusions and surmises, and inferences. 'Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established.' National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660."
>
> *Del E. Webb Const. Co. v. N. L. R. B.,* 196 F. 2d 841, 845, 847.

The Examiner's indulgence in inference is condemned in *Interlake Iron Corp. v. N. L. R. B.* (C. A. 7, Oct. 1942), 131 F. 2d 129:

> "But an inference cannot be piled upon an inference, and then another inference upon that, as such inferences are unreasonable and cannot be considered

as substantial evidence. Such a method could be extended indefinitely until there would be no more substance to it than the soup Lincoln talked about that was 'made by boiling the shadow of a pigeon that had starved to death.' "

Interlake Iron Corp. v. N. L. R. B., 131 F. 2d 129, 133.

It is stated in *N. L. R. B. v. International Brotherhood* (C. A. 8, April 1952), 196 F. 2d 1:

" 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co. v. Labor Board, 305 U. S. 197, 229, 59 S. Ct. 206, 217, 83 L. Ed. 126. Quoted in Universal Camera Corp. v. Labor Board, 340 U. S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456. It 'must do more than create a suspicion of the existence of a fact to be established.' Labor Board v. Columbian Enameling & Stamping Co., 306 U. S. 292, 300, 59 S. Ct. 501, 83 L. Ed. 660."

N. L. R. B. v. International Brotherhood, 196 F. 2d 1, 4.

Other instances of procedural deficiencies in this proceeding are considered elsewhere in this brief.

V.

In Finding That Mr. Osbrink's Talk to the Employees on January 24, 1952 Constituted Interference, the Trial Examiner Failed to Give Sufficient Weight to All of the Comments Made.

The portion of Mr. Osbrink's speech which the Trial Examiner felt violated the Act is quoted in the Intermediate Report, footnote 2 [R. 28]. The Trial Examiner refused to give any weight to the final paragraph of Mr. Osbrink's talk, and which was the portion immediately following the statement which the Trial Examiner thought offended the Act. This statement which the Trial Examiner refused to consider was the statement that the offer he had just made had been made by him many years ago. In the next two sentences he stated twice in different manners that he was not making the statement by way of inducement to employees. We feel that a fair consideration of this speech will not permit this portion of it to be ignored. The meaning which can be read into language, and the intent which can be attributed to any statement is virtually without limit, dependent only upon the imagination of the one interpreting the language. Whether the rights of the employees could be fairly considered as being violated by this speech must be determined from its effect as a whole and not by the possible meaning which could be read into an isolated portion of it. The speech was obviously quite long, and we submit that when read as a whole and with proper weight given the last paragraph, it must be held to be within the area of free speech [see R. 142-158].

In that connection we wish to point out that the Intermediate Report runs afoul of Section 8(c) of the Act. The Trial Examiner finds [R. 45] that in the light of "Respondent's strong bias" against the Union he was convinced that LeFlore was discharged because of his organizational activities. We understand this to mean that the Trial Examiner has used statements, which the Trial Examiner did not find illegal, as establishing the fact that the Respondent disliked entering into a bargaining relationship with the Union. Such statements are privileged, and it is not the Board's right to make conclusions on the basis of an opinion expressed by an individual on such matters and Section 8(c) of the Act was inserted to give express recognition to this limitation. It would seem from other portions of the Intermediate Report that the Trial Examiner used expressions of opinion by Respondent, protected as free speech under the Constitution and by Section 8(c) of the Act, in weighing evidence and coming to conclusions with respect to the existence of unfair labor practices. We submit that this constitutes prejudicial error, requiring that the Intermediate Report be stricken, and that the matter be retried.

> *Pittsburgh S. S. Co. v. N. L. R. B.* (C. A. 6, Feb. 1950), 180 F. 2d 731, affirmed (1951), 340 U. S. 498.
>
> "With reference to the right of free speech the legislative history shows that the amendment embodied in §8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using

unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct."

Pittsburgh S. S. Co. v. N. L. R. B., 180 F. 2d 731, 735.

N. L. R. B. v. Ray Smith Transport Co. (C. A. 5, Dec. 1951), 193 F. 2d 142.

"Neither are the findings that statements attributed to officers and employees of the company were made in violation of Sec. 8(a)(1) of the act any better grounded in fact or in law. They are not grounded in fact because they are not supported by the credible evidence in the record viewed as a whole. They are not grounded in law because the expression of the views, attributed to and shown by the credible evidence, upon the record as a whole, to have been made by respondent, do not, under the express provisions of the Labor Management Act, 29 U. S. C. A., §158(c) 'constitute or [are they] evidence of an unfair labor practice.' The findings and order of the board are without support in the evidence. An appropriate decree denying enforcement may be presented for entry."

N. L. R. B. v. Ray Smith Transport Co., 193 F. 2d 142, 146-147.

See also:

In the Matter of The Carpenter Steel Company (Mar. 1948), 76 N. L. R. B. 670;

In the Matter of Consumers Cooperative Refinery Association (May 1948), 77 N. L. R. B. 528, 530.

We also submit that the question of whether Mr. Osbrink's speech was violative of the Act can only be properly answered in the light of the entire atmosphere and context in which it was uttered. Respondent's Exhibits 5-A through 5-T, which were offered for that purpose, were rejected, and we submit that the rejection was prejudicial error which destroys the finding that Mr. Osbrink's speech was violative of the Act. There is nothing in the speech which as a matter of law is illegal. The statements can become illegal only by a process of interpretation, which interpretation can be properly made only in the context in which it was made. While it is true that it is the Board's function in the first instance to evaluate this speech and to draw reasonable inferences as to its meaning, the Board may not perform this function without considering all of the evidence which has a bearing.

The California Code of Civil Procedure provides:

> "§*1854. When part of a transaction proved, the whole is admissible.* When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood, may also be given in evidence. [Enacted 1872.]"
>
> Code Civ. Proc., Sec. 1854.

We submit that the finding with respect to Mr. Osbrink's speech must be reversed and the matter must be remanded to the Board for a consideration of Respondent's Exhibits 5-A through 5-T.

VI.

The Charging Labor Organization Was Not in Compliance With the Act When It Filed the Charge or at Any Time Subsequent Thereto.

The charge and the two amended charges were filed by the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW-CIO), Region 6 [R. 3-9]. The Trial Examiner made a conclusion of law and a finding of fact that the organization just named was a labor organization within the meaning of the Act [R. 26, 57]. The term "Union" as used in the Intermediate Report was defined to include the organization just named [R. 23]. The Board adopted these findings and no exceptions were filed to them by any party. The order which the Board issued against Respondent required the Respondent to cease and desist from discouraging membership in or from interfering with the rights of employees to join the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO (UAW-CIO), Region 6 [R. 80-81]. The notice which the order required Respondent to post provided that Respondent would not discourage membership in that organization and that employees were free to join that organization.

The designation "Region 6" following the name of the International Union designates Region 6 as the filing party and not the International Union. Thus, if in place of Region 6 we place Local Union No. 100, it would be clear that Local Union No. 100 and not the International Union was the charging party. It is common knowledge that the name of the international organization is a part

of the name of its subsidiary organizations and the name of the international must be included with the name of the subsidiary organization to properly described the latter. Thus, when the Board found this organization to be a labor organization and to have been the organization which filed the charge, it must be understood as meaning that Region 6 was the organization referred to. Such is the plain meaning of words. Region 6, as an organization, has never complied with the filing requirements of Section 9(f), (g) and (h) of the Act so that a complaint may not be issued upon a charge filed by it. The Board did not make an express finding that Region 6 was not in compliance but it is clear from the record that such is the case. Respondent's motion for reconsideration was upon the ground that Region 6 was not in compliance [R. 85] and the supplemental decision of the Board did not deny that fact and, indeed, implicitly agrees that such is the fact [R. 100]. The Board's supplemental decision refused to dismiss the complaint because of the noncompliance of Region 6. Instead, the Board amended its decision and order to delete "Region 6" wherever it occurred "to avoid any further ambiguity" [R. 103] and found as a fact that Region 6 was not a labor organization within the meaning of the Act but merely an administrative subdivision of the International Union. The finding was based by the Board upon a consideration of the constitution of the International Union. The Board's brief states that this constitution had been submitted to the Board as an attachment to a brief filed by this Respondent (Board's Op. Br. p. 36, fn. 18). That statement is incorrect. Respondent did not submit the Union's constitution to the Board, and it is our position that the Board was not entitled to consider it without no-

tice to Respondent. It does not appear upon the record before this court how the constitution was called to the Board's attention. The fact is, however, that it was called to the Board's attention by a memorandum filed by the General Counsel for the charging Union in reply to Respondent's motion to dismiss for failure of compliance. The Board apparently took official notice of the contents of the constitution. The Board's Rules and Regulations provide (Sec. 102.46) that exceptions to the Intermediate Report must be filed within twenty days from the order transferring the case to the Board. Subparagraph (b) provides:

> "No matter not included in a statement of exceptions may thereafter be urged before the Board or in any further proceedings."
>
> N. L. R. B. Rules and Regulations, Sec. 102.46(b).

Section 102.48 of the Board's Rules and Regulations provides in part:

> "In the event no statement of exceptions is filed as herein provided, the findings, conclusions, and recommendations of the trial examiner as contained in his intermediate report and recommended order shall be adopted by the Board and become its findings, conclusions, and order, and all objections and exceptions thereto shall be deemed waived for all purposes. However, the Board may, in its discretion, order such case closed upon compliance."
>
> N. L. R. B. Rules and Regulations, Sec. 102.48(a).

We submit that these Rules of the Board must be uniformly applied. We do not doubt the Board's authority to rescind its rule or modify it. We do contend that it may not suspend the rule in one case and apply it in another. The supplemental decision of the Board in hold-

ing that the Trial Examiner had not found "Region 6" to be a labor organization [R. 101], and its order deleting the term "Region 6" wherever it occurred in the decision and order, are reopening a finding of fact and conclusion of law which under the Board's Regulations had become final on the failure of any party to take timely exception to it.

In short, the point is that the Board found Region 6 to be a labor organization and to be the charging party, and this finding became final. Region 6 has never been in compliance with the Act so that a complaint may not issue upon a charge filed by it. We also submit that even if the Board could rescind its finding with respect to Region 6 and consider the Union's constitution as evidence, it may not do so in the manner in which it has followed here. The Board's procedure should be strictly held to meet the standards of the rules established to govern it, and if they do not meet those standards it is to defeat the purpose of the rules to permit them to be loosely and nonuniformly applied.

Conclusion.

We respectfully submit that the Board's order is not in accord with the law or the evidence and that the Board's petition for enforcement should be denied and the proceeding dismissed.

Dated: April 7, 1954.

Respectfully submitted,

FRANK M. BENEDICT,

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
By WILLIAM F. SPALDING,
Attorneys for Respondents.

No. 14073.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

R. H. OSBRINK, M. E. OSBRINK, and BERTON W. BEALS as Trustee, Co-partners, Doing Business Under the Firm Name and Style of R. H. OSBRINK MANUFACTURING COMPANY,

Respondents.

PETITION FOR REHEARING.

FRANK M. BENEDICT,
458 South Spring Street,
Los Angeles 13, California,

GIBSON, DUNN & CRUTCHER,
WILLIAM F. SPALDING,
634 South Spring Street,
Los Angeles 14, California,

Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 14073.

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Respondents.

PETITION FOR REHEARING.

Statement.

The Respondent herein respectfully petitions this Court for a rehearing on its opinion filed herein on December 20, 1954. Respondent submits that this Petition should be granted for the following reasons:

1. The Court holds that Derry Smith and Wally Watkins were not supervisors within the meaning of the Act, thereby disagreeing with the Board's finding to the contrary. However, the opinion apparently approves and affirms the five independent violations of the Act which were attributed solely to statements made by said Smith and Watkins and which could be affirmed only on the finding that said Smith and Watkins were supervisory employees. Thus, at the end of the Court's opinion it is

stated that all of the allegations of independent violations of Section 8(a)(1) "were proved".

2. The Court found that the independent violations of Section 8(a)(1) alleged in paragraph 4 of the Complaint were timely filed, particularly because said allegations relate to the same acts and are proved by the same evidence as the charges contained in the original charge which was timely filed. However, the only allegations of the original charge were that LeFlore and Plummer were discriminatorily discharged and the only finding of unfair labor practice under paragraph 4 of the Complaint which can be affirmed under the Court's opinion is that of Mr. Osbrink's talk to the employees which was found to contain a promise of benefit if they would reject unionization. We submit, therefore, that the finding is erroneous that the promise contained in Mr. Osbrink's talk relates to the same act or is proved by the same evidence as the discharge of LeFlore and Plummer.

3. The Board's Order herein would restrain Respondent from any and all violations of the Act. It is as broad as all of the substantive provisions of the Act itself. The only unfair labor practices which can be affirmed consistent with the Court's opinion filed herein are the discharge of LeFlore and Plummer and Mr. Osbrink's talk which is alleged to contain a promise of reward. This Court and the United States Supreme Court have consistently held that in such a case the order can restrain only the specific violations found and the record will not support a broad order restraining any and all subsequent violations of the Act.

In the event this Petition is denied, Respondent prays that it be considered as exceptions to the form of decree proposed by the Board.

I.

The Court's Finding That Smith and Watkins Were Not Supervisory Employees Within the Meaning of the Act Requires That All Unfair Labor Practices Predicated Upon Their Statements Be Overruled.

The Court stated at the end of its opinion that all of the allegations of paragraph 4 of the Complaint (which allegations are set forth in full on page 7 of the Court's opinion) were timely filed, and were proved. We submit that this statement is erroneous since the Court had already found that no unfair labor practices could be predicated upon statements of Smith and Watkins since the Board's finding that they were supervisorial employees was without support in the record. The fact that the Court's statement is in error is clearly indicated by considering the specific unfair labor practices which the Board found and by then comparing them to the allegations of paragraph 4 of the Complaint.

In addition to finding that the discharge of LeFlore and Plummer violated Sections 8(a)(3) and 8(a)(1) of the Act, the following are all of the unfair labor practices which the Board found and all were found to violate only Section 8(a)(1):

(1) A statement by Derry Smith that Respondent would close the plant if the Union won the election [R. 35-36].

(2) A statement by Derry Smith to employee Goynes that Respondent would withdraw certain privileges if the Union won the election [R. 36].

(3) A statement of Derry Smith to said Goynes that the latter was slated for discharge for Union activities [R. 47].

(4) A statement by Derry Smith to the effect that LeFlore would not be rehired since he had been seen passing out Union pamphlets [R. 47].

(5) A statement by Derry Smith and Wally Watkins to the effect that LeFlore's discharge was for Union activity [R. 47].

(6) The speech of Mr. Osbrink to the employees on January 24, 1952, which was found to contain a promise of benefit if employees would reject unionization [R. 30].

Thus, it is manifest that the first five findings of unfair labor practice listed above were predicated solely upon conduct and statements of Smith and Watkins, and said findings of unfair labor practice cannot stand in view of the Court's finding that Smith and Watkins did not have supervisorial or managerial status. The six findings of unfair labor practice listed above are the only findings made pursuant to paragraph 4 of the Complaint. Therefore, under the Court's findings, the allegations of paragraph 4 of the Complaint were not proved except as to subparagraph (d) thereof (discharging LeFlore and Plummer because of their Union activity) and subparagraph (f) thereof (Mr. Osbrink's talk which was found to contain a promise of benefit if employees would reject unionization). Subparagraph (a) of paragraph 4 of the Complaint was specifically rejected by the Board itself [R. 36-37]. Subparagraph (g) of paragraph 4 of the Complaint was effectively removed from the proceeding at the hearing before the Trial Examiner when he stated [R. 126] that such "catchall phrases" were insufficient and that he would find only on the basis of specific allegations of unfair labor practices [R. 122-126].

Subparagraphs (b), (c) and (e) of paragraph 4 of the Complaint, in the light of the specific findings of unfair labor practice made by the Board, can be related only to those findings predicated upon statements by Smith and Watkins and, therefore, cannot be held to have been proved since those individuals were not supervisors.

II.

The Charge With Respect to Mr. Osbrink's Talk to Employees Is Barred by Section 10(b) of the Act Since It Is Not Related to the Discharges Alleged in the Amended Charge.

We recognize that subparagraph (d) of paragraph 4 of the Complaint (discharge of employees for Union activity) is in no way affected by the six months limit of Section 10(b) of the Act since the charge which admittedly was timely filed expressly alleged discharge of employees as being in violation of both Section 8(a)(3) and Section 8(a)(1) of the Act. For the reasons stated under title I above, the only remaining allegation of paragraph 4 of the Complaint which is any longer involved is subparagraph (f) which was found to have been proved by means of Mr. Osbrink's talk to employees the day preceding the election and upon the finding that such talk constituted a promise of reward and benefit to employees by way of monetary contribution from the employer if the employees would remain unorganized. Subparagraph (f) of paragraph 4, in the light of that finding, is the only allegation which now need be considered and judged under the six months rule of Section 10(b) of the Act.

It must first be recognized, and the Court's opinion does so recognize, that Mr. Osbrink's talk as first al-

leged in the Complaint, was never alleged in any previous unfair labor practice charge or amended charge, and the issuance of the Complaint alleging that matter was more than six months after the making of the talk. The Court's opinion proceeds on the ground that the new matter in order to avoid the six months limit of Section 10(b) must be related to the allegations of the previously timely filed charge. The Court concludes after consideration of authority setting forth that rule that in the case at hand the enlarged charge (which consists now only of Mr. Osbrink's talk to employees) was timely as it "must stand or fall upon the evidence as to the violation originally charged." The Court concluded with the statement, "In fact, the original charges and the charge enlarged by the allegation in the complaint relate to the same acts. In these circumstances, we think the relation back theory is applicable by its general application and operation of the proviso to §10(b) of the Act."

We submit that the application of the rule stated by the Court to the facts here will not support the conclusion reached. We think this is clearly indicated by an examination of just exactly what was alleged in the charge and exactly what was alleged in the new allegations contained for the first time in the Complaint filed more than six months after the occurrence of the acts. There is no argument but that the charge and the amended charge alleged a violation of the Act only in the discharge of specifically named employees. Absolutely nothing else was alleged. This timely filed charge found its way into

the Complaint by the allegations in paragraphs 5 and 4(d) that Respondent had violated the Act in the discharge of John LeFlore on January 15, 1952, and Archie Plummer on February 29, 1952. To that extent the allegations of the Complaint are timely, but those allegations exhausted the limits of the charge. Paragraph 4(f) of the Complaint alleged a violation in the offering of benefits and rewards to employees if they would withhold their support to the Union, and this was found to have been proved by the talk by Mr. Osbrink on January 24, 1952 [R. 30]. The fact that the evidence which proves the discharge is in no way related to or proves the making of Mr. Osbrink's talk or any question as to its legality is established by the fact that the Trial Examiner's report, the Board's decision, and the Court's decision in no way relies upon the evidence of either of those discharges in considering the validity of Mr. Osbrink's talk to employees. It is equally clear from examining the nature of the discharges and the nature of the talk that the two are not related by way of evidence to prove either. The evidence with respect to the discharges consisted of an examination of the work history and efficiency or lack of it of the individuals involved, their absentee record and a comparison of their performance to the performance of other employees who had not been discharged. None of that was involved under paragraph 4(f) of the Complaint, and the evidence considered by the Board in finding that Mr. Osbrink's talk violated the Act was merely the talk itself. Thus,

we respectfully submit that subparagraph (f) and the related finding of unfair labor practice cannot be held to be proved by the same evidence as was used to prove the violations contained in the original charge.

Nor can it be said with any greater force or logic that the allegations of paragraph 4(f) of the Complaint "relate to the same act" as were alleged in the timely filed charge. The discharge of an employee bears no relation to a promise of benefit made at a different time in the circumstances presented here. The fact that both acts are violations of the Act, and that they were committed by the same employer is not sufficient to establish the required degree of relationship. If it were sufficient, then any unfair labor practices committed by the same employer within six months of the filing of any charge would be held to be related. If that were the case, then any charge would open up all matters within six months preceding its filing and the statute of limitations expressed in Section 10(b) would be of no practical effect. In that connection we wish to point out the recent holding of the National Labor Relations Board in *Knickerbocker Mfg. Co.* (Sept. 9, 1954), 109 N. L. R. B. No. 169, 34 LRRM 1551. That case overruled the previous decision of *Cathey Lumber Company* (Sept. 28, 1949), 86 N. L. R. B. 157, which the Board relied upon in its decision here [R. 78, 103]. In overruling that case, the Board in *Knickerbocker Mfg. Co.* had before it, in part, the question of whether a discriminatory refusal to reinstate an employee was sufficiently related to a charge

of discriminatory discharge of the same employee for the purpose of applying Section 10(b) of the Act, and in holding it was not, stated:

> " 'Assuming, however, that the March requests were for employment generally, we would find that they were barred by Section 10(b) of the Act. *We think it is clear that the amended charge raised a new and separate cause of action which must independently satisfy the limitations of Section 10(b).* This view differs materially with the prior holdings of this Board in its Cathey and subsequent decisions that the filing of an original charge tolls the running of the 10(b) limitations so as to permit adjudication of any and all subsequent unfair labor practices. Such a broad interpretation of Section 10(b) has never, save for one possible exception, been adopted by the courts and is indeed contrary to the weight of judicial precedent. * * *' " (Emphasis added.)
>
> *Knickerbocker Mfg. Co.,* 109 N. L. R. B. No. 169, 34 LRRM 1551, 1552-1553.

Certainly it would seem that the degree of relationship which was held insufficient in the *Knickerbocker Mfg. Co.* case is much closer than exists here between the allegation in the charge with respect to the discharge of LeFlore and Plummer and the talk made by Mr. Osbrink to employees.

We respectfully submit, therefore, that paragraph 4(f) of the Complaint was not timely filed and is barred by Section 10(b) of the Act since it was first alleged more than six months after the events complained of and is not sufficiently related to the allegations contained in the previously filed charge.

III.

The Order Which the Board Seeks Here to Enforce Is Too Broad in Form Even if All of the Unfair Labor Practices Alleged Are Well Founded.

The Order which the Board seeks to enforce is of the broadest type which it could frame. The Order is set forth beginning on page 80 of the record. Paragraph 1(d) thereof is a blanket injunction which is framed so as to restrain any and all acts by Respondent which would in any way be a violation of any provision of the Act. The courts have consistently held that such an Order may be entered only in extreme cases. The unfair labor practices which are alleged here are indeed small compared to those involved in the cases which have approved an order of the type which the Board seeks here to enforce.

The General Counsel of the Board has submitted to the Court its proposed decree to be entered in this matter, and the form is identical with that attached to the Board's decision. This form of proposed decree in paragraph 1(b) orders Respondent to cease and desist from threatening that union representation would result in closing of the plant and in loss of benefits. Clearly, that provision must be deleted since the only finding that such conduct occurred was predicated upon the finding that Derry Smith was a supervisory employee. The Court has expressly disagreed with that finding and the proposed decree is inconsistent with the Court's opinion. Thus, the Court's decision herein requires the deletion of paragraph 1(b) from the Order and the deletion of paragraph 1(d) would be required even if the Court had affirmed every finding of unfair labor practice made by the Board and is particularly required in view of the fact that the Court's decision re-

quires the reversal of five independent findings of unfair labor practice.

As we understand the Court's decision, the only findings of unfair labor practice which are affirmed is the discharge of LeFlore and Plummer and that relating to the talk of Mr. Osbrink to the employees the day before the election. These findings consist of two cases of violation of Section 8(a)(3) and one independent violation of Section 8(a)(1). In such circumstances the provisions of Section 1(d) cannot properly be sustained. It should be recognized that there are five types of employer unfair labor practices. Section 8(a)(2) deals with assistance and domination of labor unions which is in no way involved in this proceeding; Section 8(a)(4) deals with discrimination against employees for giving testimony under the Act and is in no way involved in this proceeding; Section 8(a)(5) requires an employer to bargain in good faith with a union which has been chosen as the employees' representative and that also is not involved in this proceeding. Section 1(d) of the Board's Order would, therefore, make it a violation of the Order for the Respondent to do any of those things and it is obvious that Respondent has never done them at all nor is there the slightest implication of a threat to do so at any time. To enforce this Order would mean that Respondent would be enjoined from refusing to bargain in good faith with the employees' representative at a time when the employees have never designated a representative. This Court and the Supreme Court have repeatedly held that where the only violations are of Sections 8(a)(3) and (1) of the Act the order cannot enjoin violations of other sections of the Act, and, equally, when the only violation is of

Sections 8(a)(5) and (1) of the Act the order cannot enjoin violations of Section 8(a)(3) of the Act.

Thus, in *N. L. R. B. v. Jay Co., Inc.* (C. A. 9, July 2, 1954), 34 LRRM 2589 (official citation not available) the Board affirmed findings of violation of Sections 8(a)(3) and (1) of the Act which consisted of discharging an employee because of his conduct in disbanding an independent labor organization. Violations of Section 8(a)(2) were also present upon a finding that the employer had illegally assisted the independent labor union. The Board's order which it sought to enforce contained a provision similar to Section 1(d) of the Order involved in the instant proceeding and this court held that the order was too broad to be enforced in that form in the light of the character of the violations which had been found. The court stated:

> "In one respect we consider the Board's order to be too broad. The evidence does not show extensive anti-union activities or activities of an aggravated character evincing an attitude of general opposition to rights of employees. A blanket restraint is unwarranted. N. L. R. B. v. Nesen, 211 F. 2d 559, 33 LRRM 2773. Subsection (e) of Paragraph 1 of the Board's order will be eliminated."
>
> *N. L. R. B. v. Jay Co., Inc.,* 34 LRRM 2589, 2592.

Similarly in *N. L. R. B. v. Cowles Pub. Co.* (C. A. 9, June 28, 1954), 214 F. 2d 708, this Court affirmed the Board's finding that the employer had violated the Act in discharging sixteen employees for union and concerted activity. The Board's order included a provision similar to Section 1(d) of the Order before the Court in this case and again the Court refused to enforce that provision of

the order since it was unjustifiably broad (214 F. 2d 711).

In *N. L. R. B. v. Express Pub. Co.* (1941), 312 U. S. 426, 85 L. Ed. 930, the unfair labor practice finding consisted of violation of Sections 8(5) and (1) in refusal to bargain in good faith with the bargaining agent. The Board sought to enforce an order prohibiting any and all violations of the Act, and the Supreme Court held that such an order was not justified. The Court stated in part:

> "It is obvious that the order of the Board which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
>
> * * * * * * * *
>
> "Refusal to bargain may be, as we think it was here, wholly unrelated to 'discrimination in regard to the hire or tenure of employment on any term or condition of employment to encourage or discourage membership in any labor organization,' all of which are unfair labor practices as defined by §8(3)."
>
> *N. L. R. B. v. Express Pub. Co.,* 312 U. S. 426, 85 L. Ed. 930, 936.

We submit that it is equally clear that a finding of Section 8(a)(3) is "wholly unrelated" to a refusal to

bargain with the bargaining agent as required by Section 8(a)(5) of the Act.

We submit, therefore, that the proposed decree submitted to the Court by the General Counsel is unjustifiably broad and that paragraphs 1(b) and (d) should be deleted therefrom with corresponding deletions in the notice which Respondent is required to post.

Conclusion.

Respondent respectfully prays, therefore, that the Court grant this Petition for Rehearing and that upon the rehearing of this cause the Court's opinion and decree be modified as requested herein.

Dated: January 17, 1955.

Respectfully submitted,

FRANK M. BENEDICT,

GIBSON, DUNN & CRUTCHER,

WILLIAM F. SPALDING,

By WILLIAM F. SPALDING,

Attorneys for Respondents.

Certificate of Counsel.

The undersigned hereby certifies that he has prepared this Petition for Rehearing and that the grounds therein stated are in his opinion well founded and that this Petition is not filed for reasons of delay.

WILLIAM F. SPALDING, of
GIBSON, DUNN & CRUTCHER,
Attorneys for Respondents.

No. 14076

United States Court of Appeals

for the Ninth Circuit

ANGEL VIDALES, Also Known as ANGEL VIDALES-GALVAN,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-20-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. WIDOFF,
206 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;
CLYDE C. DOWNING,
ROBERT K. GREAN,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

United States District Court, Southern District of California, Central Division

No. 14814-B. H.

ANGEL VIDALES, also known as ANGEL VIDALES-GALVAN,

Plaintiff,

vs.

JAMES P. McGRANERY as Attorney General of the United States,

Defendant.

PETITION FOR DECLARATION OF UNITED STATES NATIONALITY UNDER SECTION 503 OF THE NATIONALITY ACT OF 1940 (8 U.S.C.A. 903)

The plaintiff for cause of action alleges:

I.

That this complaint is filed and these proceedings are instituted against the defendant under Section 503 of the Nationality Act of 1940 (54 Statute 1171, 1172, 8 U.S.C.A. 903), for a judgment declaring the plaintiff to be a national of the United States.

II.

Plaintiff is a resident of Los Angeles County, California.

III.

That the defendant is the duly appointed, qualified and acting Attorney General of the United

States and as such is head of the Department of Justice; that the Commissioner of Immigration and Naturalization at Washington, D. C., the members of the Board of Immigration Appeals, Department of Justice, Washington, D. C., and the members of the Board of Special Inquiry, District of San Ysicro, California, are and at all times herein complained of were [2*] executive officers of the defendant within the Department of Justice.

IV.

That the plaintiff Angel Vidales, also known as Angel Vidales-Galvan, was born in Anaheim, California, on July 11, 1922, and that by virtue of his birth in this country is a national of the United States; that the various boards of special inquiry, the Commissioner of Immigration and Naturalization at Washington, D. C., and the Board of Immigration Appeals at Washington, D. C., are the official executive and subordinate officers and agents of the defendant James P. McGranery as Attorney General of the United States. That the defendant, acting through his official executives, subordinates and agents, has denied and continues to deny the plaintiff rights and privileges to which the plaintiff is entitled to as a national of the United States, by debarring and excluding plaintiff from entering the United States as a national of the United States in January, 1950, and will continue to do so in the future unless restrained by this court.

Wherefore, the plaintiff prays for judgment declaring him to be a national of the United States;

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

and that the defendant, his agents and servants, be restrained and enjoined from excluding or debarring the plaintiff from the United States or otherwise restraining or treating him as an alien pending the determination of said matter, and for such other and further relief as may be just and proper.

/s/ ANGEL VIDALES,
Plaintiff.

/s/ J. WIDOFF,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed December 5, 1952. [3]

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S COMPLAINT

Comes the defendant, James P. McGranery, as Attorney General of the United States through his attorneys Walter S. Binns, United States Attorney for the Southern District of California; Clyde C. Downing and Robert K. Grean, Assistants United States Attorney for the Southern District of California, and in answer to plaintiff's complaint herein admits, denies, and alleges as follows:

I.

Defendant neither admits nor denies the allegations contained in Paragraph I of plaintiff's complaint on the ground that said allegations are conclusions of law.

II.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph II of said complaint, and on that ground, denies said allegations.

III.

Admits the allegations contained in Paragraph III of plaintiff's complaint except that heretofore and subsequent to the filing of plaintiff's complaint [5] James P. McGranery ceased to be Attorney General of the United States and has been succeeded by Herbert Brownell as Attorney General of the United States and head of the Department of Justice and that at the proper time defendant will stipulate that the said Herbert Brownell may be substituted as the proper party defendant.

IV.

Answering Paragraph IV of plaintiff's complaint, defendant admits that the plaintiff was born in Anaheim, California, on July 11, 1922, but denies that said plaintiff is now a citizen of the United States. Defendant further admits that the defendant, acting through his official executives has denied entry to the United States of the plaintiff, but alleges that said denial of permission to enter is based upon the ground that the plaintiff is an alien.

For a further separate and second affirmative defense, defendant alleges:

I.

That the plaintiff departed the United States for Mexico in 1925 and remained in Mexico from 1925 until on or about January 15, 1946.

II.

That the plaintiff reached his 18th birthday on July 11, 1940, while a resident of Mexico.

III.

That the defendant knew the United States was at war during the years 1942 to 1945, inclusive, and knew also that he had an obligation during the years 1942 to 1945, inclusive, to offer his services in the armed forces of this country.

IV.

That the plaintiff remained outside of the jurisdiction of the United States in time of war, to wit: From September 27, 1944, to January 15, 1946, for the purpose of evading or avoiding training and services in the Land or Naval Forces of the United States.

V.

That the plaintiff has, thereby, expatriated himself and has lost his United States nationality. [6] And for a further, separate and third defense, defendant alleges:

I.

Plaintiff's complaint fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dis-

missing said complaint, denying the relief prayed for therein, and for such other relief as to the Court seems just and proper in the premises.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney, Attorneys for United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 5, 1953. [7]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

At a conference held under Rule 16, F.R.C.P., by direction of Wm. M. Byrne, Judge, the following admissions and agreement of fact were made by the parties and require no proof:

(1) That the plaintiff was a citizen of the United States by birth, having been born at Anaheim, California, on July 11, 1922.

(2) That the plaintiff left the United States and went to Mexico about 1925 and remained there until about January, 1946, when he returned to the United States. He remained in the United States until about July, 1948.

(3) That the plaintiff left the United States in 1948 and went to Mexico and sought to return to the United States the same year but was excluded by the Immigration and Naturalization Service of the United States, Department of Justice, of which the Attorney General of the United States of America is the department head. [9]

Issues of Fact to Be Tried

(1) Did the plaintiff become expatriated by remaining outside the United States during time of war and an emergency for the purpose of evading military training and service in the armed forces of the United States as provided by Section 401 (j) of the Nationality Act of 1940 (8 U.S.C.A., 801 (j)).

Issues of Law

(1) The issue in this is whether or not the plaintiff did commit any act which could be construed as coming within the provisions of Section 401 (j) of the Nationality Act of 1940 (8 U.S.C.A., 801 (j)).

Dated:

/s/ WM. M. BYRNE,
Judge of the U. S. District Court.

/s/ J. WIDOFF,
Attorney for Plaintiff.

/s/ ROBERT K. GREAN,
Attorney for Defendant.

[Endorsed]: Filed May 11, 1953. [10]

[Title of District Court and Cause.]

MINUTES OF THE COURT—JULY 14, 1953

Present: The Hon. Wm. M. Byrne,
District Judge.

Proceedings: For trial.

On motion of plaintiff it is ordered that Herbert A. Brownell, Attorney General, U.S.A., be, and he is substituted as defendant.

J. Duran is sworn as Spanish Interpreter and is examined on voir dire by Attorney Grean.

Plaintiff is called, sworn, and testifies in his own behalf through said interpreter.

At 11:10 a.m., court recesses. At 11:15 a.m., court reconvenes herein.

Plaintiff resumes testimony in his own behalf.

Plaintiff rests.

Ralph J. Lloyd is called, sworn, and testifies for defendant.

Deft's Ex. A is marked for ident. and admitted in evidence.

Defendant rests.

Counsel argue. Court makes a statement, and

It is ordered that judgment is in favor of defendant; Attorney Grean to prepare findings and judgment accordingly.

EDMUND L. SMITH,
Clerk;

By /s/ EDW. F. DREW,
Deputy Clerk. [11]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for trial on the 14th day of July, 1953, in the above-entitled Court, before the Honorable William M. Byrne, Judge presiding, the plaintiff being present in Court and being represented by his attorney, J. Widoff, and the defendant Herbert Brownell, Jr., as Attorney General of the United States, having been substituted by stipulation of the parties and order of the Court as party defendant, being represented by his attorneys, Walter S. Binns, United States Attorney; Clyde C. Downing and Robert K. Grean, Assistants United States Attorney, by Robert K. Grean; and evidence both oral and documentary having been presented, and the matter having been tried on its merits, and the Court, being fully advised in the premises, hereby makes its Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That the Court has jurisdiction of the subject matter of the within action under Section 503 of the Nationality Act of 1940 (8 U.S.C. 903). [12]

II.

Plaintiff claims Los Angeles County, California, within the Southern District of California, as his permanent residence.

III.

That the defendant, Herbert Brownell, Jr., is the duly appointed, qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice.

IV.

That the plaintiff, Angel Vidales, also known as Angel Vidales-Galvan, was born in Anaheim, California, on July 11, 1922, and was of parents both of whom were citizens of Mexico. That he was taken to Mexico when he was a child of about three in the year 1925. Plaintiff remained in Mexico until January, 1946, when he first returned to the United States.

V.

That the plaintiff knew almost all of his life that he was a citizen of the United States, and that for more than fifteen years it was his intention to come to the United States.

VI.

That the plaintiff knew that the United States was at war and that he had an obligation during the years 1942 to 1945, inclusive, to offer his services in the armed forces of the country, he having become twenty-one years of age in 1943.

VII.

That the plaintiff remained outside the jurisdiction of the United States after September 27, 1944, to evade or avoid training and service in the armed forces of the United States, in time of war or during a period declared by the President to be a period of national emergency.

Conclusions of Law

I.

That the plaintiff, having been born in the United States, was a citizen of the United States by birth, under Section 1 of the Fourteenth [13] Amendment of the Constitution of the United States.

II.

That the plaintiff, from and after September 27, 1944, having remained outside of the jurisdiction of the United States in time of war and during a period declared by the President to be a period of national emergency, for the purpose of evading or avoiding training and service in the land or naval forces of the United States, has expatriated himself under Section 401 (j) of the Nationality Act of 1940 (8 U.S.C. 801 (j)).

III.

That plaintiff has lost his United States citizenship by expatriation.

IV.

That the defendant should have judgment against the plaintiff, and for his costs.

Dated this 4th day of August, 1953.

/s/ WM. M. BYRNE,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 1, 1953. [14]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintff objects to the findings set forth in paragraphs VI and VII of the proposed findings of fact submitted herein by the defendant, and in lieu thereof proposes the finding that the plaintiff did not know the United States was at war or that he had any obligation during the years 1942 to 1945 to offer his services in the armed forces of the United States, and that the plaintiff did not remain outside the jurisdiction of the United States after September 27, 1944, or any other time, with the intention or purpose of evading or avoiding training and service in the armed forces of the United States in the time of war or any other time, and that his failure to register for military service in the United States during the period prior to his return to the United States was due to the fact that he did not have the funds or means with which to leave his place of residence in Mexico or pay the expense of transportation from his place of residence to the United States sooner than the time that he [16] actually left Mexico. That he had intentions of coming to the United States since attaining majority, but was prevented from so doing for lack of funds.

Plaintiff objects to the proposed conclusions of law set forth in paragraphs II, III and IV of the proposed conclusions of law submitted herein by the defendant, and in lieu thereof proposes the

following conclusions of law: That the plaintiff did not remain outside of the jurisdiction of the United States in time of war and during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding service in the land or naval forces of the United States, and has therefore not expatriated himself under Section 401 (j) of the Nationality Act of 1940 (8 U.S.C. 801 (j)). That plaintiff has not lost his citizenship by expatriation and is a citizen of the United States. That the plaintiff have judgment against the defendant and that it is declared and determined that the plaintiff is a citizen of the United States.

Dated this 28th day of July, 1953.

/s/ J. WIDOFF,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 29, 1953. [17]

In the United States District Court in and for the Southern District of California, Central Division

No. 14814-W.B. Civil

ANGEL VIDALES, also known as ANGEL VIDALES-GALVAN,

Plaintiff,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Defendant.

JUDGMENT

The above-entitled matter came on regularly for trial on the 14th day of July, 1953, in the above-entitled Court, before the Honorable William M. Byrne, Judge presiding, the plaintiff being present in Court and being represented by his attorney, J. Widoff, and the defendant Herbert Brownell, Jr., as Attorney General of the United States, having been substituted by stipulation of the parties and order of the Court as party defendant, being represented by his attorneys, Walter S. Binns, United States Attorney; Clyde C. Downing and Robert K. Grean, Assistants United States Attorney, by Robert K. Grean; and evidence both oral and documentary having been presented, and the matter having been tried on its merits, and the Court being fully advised in the premises, and having heretofore filed its Findings of Fact and Conclusions of Law;

It is hereby ordered, adjudged and decreed that the plaintiff is not a national or citizen of the United States, having expatriated himself by remaining outside of the jurisdiction of the United States, after September 27, 1944, in time of war and during a period declared by the President to be a period [18] of national emergency, for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

It is further ordered that the defendant have

judgment against the plaintiff, and for his costs. Costs taxed at $20.00.

Dated this 4th day of August, 1953.

/s/ WM. M. BYRNE,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 11, 1953.

Docketed and entered August 11, 1953. [19]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the above-named defendant and to Walter S. Binns, United States Attorney:

Please take notice that the above-named plaintiff hereby appeals to the United States Court of Appeals from the judgment of the above-entitled court entered on the 11th day of August, 1953, and to the whole thereof.

Dated this 2nd day of September, 1953.

/s/ J. WIDOFF,
Attorney for Plaintiff.

[Endorsed]: Filed September 2, 1953. [21]

In the United States District Court, Southern District of California, Central Division

No. 14,814-W.B., Civil

Honorable Wm. M. Byrne, Judge Presiding.

ANGEL VIDALES, Also Known as ANGEL VIDALES-GALVAN,

Plaintiff,

vs.

JAMES P. McGRANERY, as Attorney General of the United States,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

J. WIDOFF, ESQ.

For the Defendant:

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Asst. U. S. Attorney, Chief, Civil Division;

ROBERT K. GREAN,
Asst. U. S. Attorney, by

ROBERT K. GREAN,
Assistant United States Attorney.

Tuesday, July 14, 1953, 9:45 A. M.

The Clerk: No. 14814-W.B., Civil, Angel Vidales, also known as Angel Vidales-Galvan, v. James P. McGranery, as Attorney General of the United States, for trial.

The Court: Are you ready?

Mr. Grean: Yes.

Mr. Widoff: Yes.

The Court: You may proceed.

MOTION FOR SUBSTITUTION OF PARTY DEFENDANT

Mr. Widoff: Your Honor, I have been informed by Mr. Grean this morning that we have a new Attorney General by name of Herbert Brownell, and we have sued the one that was predecessor. Therefore, I will make a motion for substitution of defendant, substituting Herbert Brownell in lieu of the present defendant, Mr. McGranery.

Mr. Grean: The defendant will stipulate that Mr. Herbert Brownell will be substituted as party defendant, as Attorney General of the United States.

The Court: Very well. That will be the order.

Mr. Widoff: We have an interpreter, your Honor. May the interpreter be sworn?

The Court: Yes.

Mr. Widoff: Mr. Duran, please.

(Mr. J. Duran was sworn an interpreter.)

The Clerk: Your full name, please? [2*]

Mr. Duran: J. Duran. The initial is J.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Grean: May it please the Court, may I have a short voir dire of the interpreter?

The Court: Yes.

Mr. Grean: Well, I request that the interpreter be sworn, please.

The Clerk: As a witness?

Mr. Grean: Yes.

J. DURAN

the interpreter, being first duly sworn, testified as follows:

Voir Dire Examination

By Mr. Grean:

Q. Mr. Duran, will you stand over by the witness chair so the reporter can hear you.

You are qualified as an interpreter in the Federal courts? A. Yes, sir I am.

Q. And are you acquainted with the plaintiff in this case? A. No, sir.

Q. You have had no occasion to meet or talk with him prior to coming into this courtroom?

A. Excepting when he came over to my office to engage me to act as an interpreter.

Q. Who was that, that engaged you, the plaintiff, Mr. Vidales? [3] A. Yes.

Q. You talked with him at that time?

A. Yes, I did.

Q. He is the one who engaged you?

A. No. Mr. Widoff is the one that called me first.

(Testimony of J. Duran.)

Q. And at that time you talked to Mr. Widoff?

A. I did.

Q. And was there anything in the arrangement under which you have been employed as an interpreter that prevents you from stating truly to the court what questions are asked and what the answers are in Spanish as translated into English?

A. None at all.

Mr. Grean: No further questions.

ANGEL VIDALES

the plaintiff, called as a witness in his own behalf, was duly sworn and testified through the interpreter as follows:

The Clerk: His full name?

The Interpreter: Angel Vidales, Angel Vidales-Galvan.

Mr. Widoff: Your Honor, the stipulation indicates that this plaintiff was born in the United States, in Anaheim, California, on July 11, 1922, and left the United States for Mexico in about 1925, and remained there until January, 1946, when he returned to the United States, and I will therefore just rely on the stipulation as to his date of birth, place of [4] birth, and the fact that he left in about 1925, and start from there, your Honor.

Mr. Grean: No objection.

The Court: Very well.

(Testimony of Angel Vidales.)

Direct Examination

By Mr. Widoff:

Q. About how old were you when you left the United States? A. About three years.

Q. And with whom did you leave the United States?

A. With my father and my mother and brothers.

Q. And where did you go to live after you left the United States?

A. To the State of Zacatecas.

Q. And is that in Mexico?

A. Yes, in Mexico.

Q. At what sort of a place did you reside then, after you left the United States?

A. Well, for a while we were at Valpariso Valle, and from there, then, we went to live on a ranch on the Sierras.

Q. When did you go to live at this ranch in the Sierras? A. About 1927.

Q. What sort of a ranch was this? Can you describe this ranch? [5]

A. It is a very small ranch, about ten homes.

Q. And how far is that ranch from any town, the nearest town or village?

A. About 50 or 65 miles.

Q. And until what age did you live at this ranch? A. Until the age of 20 years.

Q. And at what year did you leave the ranch?

A. Well, we did not leave that ranch. We just moved to another ranch, that is all.

(Testimony of Angel Vidales.)

Q. And at what other ranch did you live?

A. In a ranch close by where we lived before we went there to farm there.

Mr. Grean: May I ask, if the Court please, that the witness be instructed to speak up so that we may hear his answers?

The Court: Yes, speak louder.

Q. (By Mr. Widoff): And this second ranch that you went to live, this last one you mentioned, how far was that from the nearest town or village?

A. About 70 miles.

Q. And who all lived on this ranch with you?

A. My father, my mother, and my brothers and sisters.

Q. And what kind of work did you do on this ranch? A. Only planting, farming.

Q. What did you farm? [6] A. Corn.

Q. And did you go to any schools at that time?

A. There was no school.

Q. How did you learn to read and write?

A. I didn't learn. When I grew up I have learned a little bit.

Q. Who taught you? A. My mother.

Q. While you were on either of these ranches, did you ever go to the nearest town or village?

A. Oh, yes, I would go there once in a while with my father.

Q. How did you get to this village?

A. On horseback.

Q. How long did it take?

A. About eight hours.

(Testimony of Angel Vidales.)

Q. And how often did you go to the village?

A. Well, I wouldn't go there often. I would go there every four or five months.

Q. And always with your father?

A. Yes, always with him.

Q. What was the purpose of going to this village? A. Well, to bring provisions or so.

Q. And during the time that you were at the ranch, did you ever hear about the United [7] States? A. No.

Q. When did you first?

A. I was very small.

Q. When did you first find out that you were born in the United States?

A. Oh, I was about 12 or 14 years.

Q. Who told you that?

A. Well, while my mother and father were talking to each other.

Q. And when you were in Mexico, did you ever hear that the United States was in a war, involved in a war?

A. No, I didn't know anything about it, because at the ranch one doesn't know about those things.

Q. When you went to the village did you ever hear anything about the United States or about the war the United States was involved in?

A. No.

Q. Will you tell the Court how it happened that you first got the idea of coming to the United States, how did that occur?

A. Well, when I was of age, you know, when one hears people talking about coming to the United

(Testimony of Angel Vidales.)

States, and I could not leave there because I didn't have any means.

Q. Didn't have any what?

A. Any means with which to live. [8]

And then finally my father, after a long time, he helped me for me to come here.

Q. Well, why did you want to come to the United States?

A. Well, to know this place here and to become acquainted with this country because I had heard talk about it.

Q. Did you have any relatives over in the United States? A. Yes.

Q. Did they ever visit you on a ranch?

A. No.

Q. Why didn't you come to the United States before you did come?

A. Because I did not have any money to move around with.

Q. How much would it cost to go from the ranch that you were then living on to the Mexican-American border?

Mr. Grean: At what time, counsel?

Q. (By Mr. Widoff): At the time that you actually left.

A. About a hundred pesos Mexican money.

Q. How did you get the money to go to the border? A. My father gave it to me.

Q. And how did he get it?

A. Well, I believe that he saved it with a little money that he got from his work.

Q. Well, what kind of work did he do to make this money?

(Testimony of Angel Vidales.)

A. Well, he was farming and he would sell corn.

Q. And what were you doing at that time? [9]

A. I was only helping him.

Q. Was he paying you any wages?

A. No, no.

Q. And tell the Court how you got away from the ranch, in what manner you got away, how it was done.

A. I left the ranch on horseback to the town.

Q. Who went with you? A. My father.

Q. What town was it that you went to?

A. Valpariso Valle, Zacatecas.

Q. And how large a town is that?

A. Oh, it isn't very large. It is about 500 people.

Q. And was there a train there, or what?

A. No. There are busses.

Q. Did you take a bus from there?

A. Yes, a bus.

Q. And did you leave your father there?

A. Yes. He remained there.

Q. All right. And then where did you go from that town? A. To Frensillo.

Q. And was there a train in Frensillo?

A. No. The train goes by about two miles from there.

Q. Well, what did you do when you got to Frensillo?

A. I got there, I went there to a cousin, and I was there for about two weeks with him. [10]

Q. And how did you leave there, by train?

A. No. From Frensillo I left on the bus to go to the train.

(Testimony of Angel Vidales.)

Q. And where did you get the train?

A. The station is called Canitas.

Q. And where did you go?

You got on the train at Canitas? A. Yes.

Q. Where did you go from there?

A. To Juarez.

Q. What happened when you got to Juarez?

A. When I got to Juarez, I had an address of a friend of my father's.

Q. What did you do when you got to Juarez?

A. I went to his home.

Q. And then what did you do?

A. While I was there with him I told him my intentions.

Q. And what happened then?

A. Well, he asked me if I had any papers and I told him that I only had my baptismal record.

Q. Then what happened?

A. Then he took me to the border, to the line, to the custom house.

Q. Then what happened?

A. Well, then they told me that that baptismal paper [11] was not sufficient.

Q. Then what happened?

A. Then they told me to go to the American Consulate at Juarez.

Q. Then what happened?

A. Then I was there with him and he gave me a certificate to cross into the United States.

Q. And did you cross into the United States?

A. Yes.

(Testimony of Angel Vidales.)

Q. What year was that? A. 1946.

Q. And after you crossed into the United States, did you register for military service?

A. Yes.

Q. How long did you stay in the United States?

A. Well, until today, until this date.

Q. How did you know about registering with the military service after you got into the United States?

A. Because I have some cousins here and they told me it was necessary for me to do it right away.

Q. And before you came to the border on this occasion in 1946, did you know anything about the laws of the United States? A. No.

Q. Did you know before you crossed the border that as [12] a citizen you were supposed to register with an American consul? A. No.

Q. After you were in the United States for a while, did you leave voluntarily? A. Yes.

Q. How long were you in the United States before you left? A. About two years.

Q. And at what point did you cross over into Mexico?

A. Well, sometimes I have crossed over before, just to visit around for pleasure, and at that time I went to see my relatives.

Q. And then what happened the last time that you had crossed over the border? What happened when you tried to get back into the United States?

A. Well, there at Calexico they did not allow me

(Testimony of Angel Vidales.)

to cross over. They took my papers away.

Mr. Widoff: The stipulation, your Honor, also indicates that he was excluded from the United States, so I don't think it is necessary to go into details on that. That is No. 3, your Honor.

The Court: Yes.

Q. (By Mr. Widoff): When you were in Mexico, did you ever vote in Mexico? [13]

A. No, sir.

Q. Did you ever work for the Mexican Government? A. No, sir.

Q. Did you ever serve in the military service of the Mexican Government? A. No.

Q. You have always been willing to serve in the military service of the United States?

A. Yes.

Q. Have you ever received a notice to appear for induction in the military service? A. No.

Q. What kind of a card did you get when you registered for the military service?

(The witness produces card.)

Mr. Widoff: The witness shows that he has a notice of classification IV-F, Local Board No. 277, Los Angeles County, which is made out to Angel Galvan-Vidales. Order No. 13130-A, and it is dated June 19, 1946, classified IV-F.

The Court: What was the date?

Mr. Widoff: June 19, 1946, your Honor.

Mr. Grean: I don't see the materiality of it, if the Court please, but I won't object to it.

(Testimony of Angel Vidales.)

Mr. Widoff: Well, I put it for the purpose of showing intention and it may have some bearing on that point. That [14] is all for the present, your Honor.

Cross-Examination

By Mr. Grean:

Q. Mr. Vidales, when did you return from the small ranch upon which you were living, to Valle Valpariso? A. When did I return?

Q. Yes. A. To live there?

Q. That is right.

A. I have never lived at that town.

Q. You have never lived at Valle Valpariso?

A. I have lived there only for a season, for a month or so.

Q. Where were you living at the time you started for the United States?

A. At the ranch.

Q. And this ranch was not at Valle Valpariso?

A. No. It is quite a bit away from the Valle.

Q. Where were you living in 1943?

A. I was at the ranch.

Q. And at that time you were not living in Valle Valpariso?

A. No. I would go there only, you know, for pleasure, for a few days or weeks.

Q. When did you first hear that the United States and [15] Mexico had been at war?

A. Well, I have never known that Mexico was at war.

(Testimony of Angel Vidales.)

Q. When did you first hear that the United States was at war?

A. The first time it was about in 1945.

Q. And where did you hear that?

A. At the times that I would go to the town. I would go there, but I couldn't leave there.

Q. You never heard about it before 1945?

A. No.

Q. How much in wages were you earning while you were farming in Mexico?

A. Well, we would only earn enough to get along with, that is about all.

Q. And how much were you paid each day?

A. No. I wasn't paid anything. I was working with my father.

Q. Mr. Vidales, do you recall a hearing given you at Calexico, California, in August of 1948?

A. Yes.

Q. And do you recall that you were asked questions and gave answers at that time?

A. Well, I don't know what kind of questions they were.

Q. But you do recall that you were questioned at that time? [16] A. Yes.

Q. And do you recall that you gave answers to those questions?

A. Well, I remember that they asked me why I hadn't given service before.

Q. And what did you say at that time in response to that question?

A. Well, I wasn't here; I couldn't have served.

(Testimony of Angel Vidales.)

Q. Do you recall the following question—and I will read the question and read your answer and ask if that question was asked you and if that was your answer:

"Q. Where were you in November, 1943?

"A. I was living with my parents in Valle Valpariso, Zacatecas, Mexico."

Mr. Grean: If your Honor please, I will give a copy of this transcript to the interpreter so that he may follow the questions.

The Interpreter: Your Honor, it would be easier if he would break the question, just give me the question and then the answer. It would be much easier. I could remember it better.

The Court: If you will just ask the question and then let him interpret it, and then the answer.

Q. (By Mr. Grean): Was that question asked of you and was that your answer? [17]

A. I don't remember.

Q. When did you reach the age of 18 years, Mr. Vidales? When did you reach the age of 18 years?

A. Well, in '40.

Q. In 1940?

A. I believe so. I don't remember.

Q. And did you register for military service in Mexico? A. No.

Q. Was it not the law in Mexico, that all males in Mexico, upon reaching the age of 18 years, would register for the armed services?

A. Well, at that time no one would say anything about it.

(Testimony of Angel Vidales.)

Q. I call your attention to a question and answer, and this is on page 4, Mr. Interpreter:

"Q. Was it not the law in Mexico, that all males in Mexico, upon reaching the age of 18 years, should register for the armed forces of Mexico?"

The Interpreter: Where is that?

Mr. Grean: That is at about the middle of the page.

"A. Yes, I believe that is the law there. However, I did not register for the Mexican military draft because I was a native-born citizen of the United States, and, if I registered for military service in any country, it was going to be the [18] United States."

A. Yes.

Q. Was that question asked of you and was that your answer? A. I don't remember.

Q. How long have you known that you are a citizen of the United States, Mr. Vidales?

A. About eight years or nine years.

Q. I believe you testified this morning that you knew when you were about 12 or 14 years. Do you recall?

Mr. Widoff: Pardon me. Not to confuse the witness, I think it was testified that he was told that he was born here when his parents were talking, but that would be different from knowing that he was a citizen at that age. He may not even know what the word "citizen" implied.

The Court: Let us go back in the record. As to the last question, it is ambiguous.

(Testimony of Angel Vidales.)

Mr. Grean: I will refer to the record of the hearing and read a question and your answer and ask you if that was asked and if that was your answer.

Q. (Reading):

"Q. For how long have you known that you are a citizen of the United States?

"A. All my life. My parents told me so to begin with, when I was very small." [19]

A. Well, I didn't know that there was such a thing as that. I only knew that I was born in the United States.

Mr. Widoff: What was that page from which you just asked the question?

Mr. Grean: Page 4.

Mr. Widoff: Page 4.

Mr. Grean: I didn't get the answer. May I have it read?

(Record read by the reporter.)

Q. (By Mr. Grean): Was that question asked of you and was that your answer?

A. I don't remember if that was made to me.

Q. How long before you came to the United States had you planned or did you have the intention of coming to the United States?

A. Oh, for about ten months or eight months.

Q. I will read a question to you:

"Q. For how long a time, prior to your entry into the United States on January 15, 1946, did you

(Testimony of Angel Vidales.)

have the intention of coming to the United States?" It is on the bottom of Page 4, Mr. Interpreter.

The Interpreter: Yes. I got it.

Q. (By Mr. Grean): "A. For, more or less, fifteen years I have intended to come to the United States."

Was that question asked of you and was that your answer? [20] A. I don't remember.

The Court: Will the reporter read the previous question and answer?

(Record read by the reporter.)

Q. (By Mr. Grean): Why didn't you come to the United States before you did, Mr. Vidales?

A. Well, because I was not able to. I had no means to do so. We were just getting along.

Q. Wasn't it because your father wouldn't let you come?

A. No. It wasn't that he did not allow me to come. It was because I had no money to come with.

Q. I call your attention again to the questions and answers which I will read to you.

The Interpreter: What page?

The Court: Page?

Mr. Grean: Page 5, at the top.

(Reading.)

"Q. When did you finally make up your mind to come to the United States?

"A. Well, for one thing, my father would not

(Testimony of Angel Vidales.)

give me permission to come to the United States, before October of 1945."

A. Well, he would not give me permission before, when I was very young.

Q. Was that question asked of you and was that your [21] answer?

A. Well, I don't remember.

Q. When did you reach the age of 21 years, Mr. Vidales? A. In '41, isn't it?

Q. It would be '43, is that correct?

A. I don't remember.

Q. Now, the question I will call to your attention:

"Q. Why was it that he gave you permission to come to the United States, after October of 1945, while he would not before?

"A. The only reason that I can give at this time was that I was so small."

Was that question asked of you and was that your answer?

A. I believe so. I don't remember about those questions.

(Reading.)

"Q. Did your father know that had you come to the United States, during the years 1942, 1943, and 1945, that you would have been liable for service in the armed forces of the United States?

"A. Yes, I think he did."

Was that question asked of you and was that your answer?

(Testimony of Angel Vidales.)

A. Yes, that question was made to me, but whether if he knew that or not, I didn't know.

(Reading.) [23]

"Q. Was that the reason that he did not give you permission to come to the United States before October of 1945? A. Yes."

Was that question asked of you and was that your answer?

A. How is that question again?

Mr. Widoff: Reread the question to him, will you, please?

(Question reread by the interpreter.)

A. Well, I don't remember.

Q. (By Mr. Grean): I will reread this question and answer for the sake of the question that follows:

"Q. When did you reach the age of 21 years?

"A. In 1943."

Was that question asked of you and was that your answer? A. Yes.

(Reading.)

"Q. Then is it not a fact that after that date you were a man grown? A. Yes."

Was that question asked of you and was that your answer? A. Well, yes.

(Reading.)

"Q. Then is it not also a fact that after reach-

(Testimony of Angel Vidales.)

ing 21 years of age in 1943, you could have come to the United States at any time? [23]

"A. Yes. I wanted to come, but my parents wouldn't let me."

Was that question asked of you and was that your answer?

A. Yes. That question, they asked that of me.

Q. And was that your answer?

A. Well, they didn't want to let me come. How could they let me come if I didn't have any money to come with?

(Reading.)

"Q. Why would not your parents let you come to the United States until October, 1945?

"A. On account of the war. They were afraid to have me enter the United States armed forces."

A. I don't remember whether that question was asked of me or that I may have answered that way.

(Reading.)

"Q. Then, did you remain in Mexico until after the end of the war, merely to comply with the wishes of your parents? A. Yes."

Was that question asked of you and was that your answer? A. I don't remember.

(Reading.)

"Q. Since September 27, 1944, have you remained outside the jurisdiction of the United States, in time of war, or during a period declared by the President [24] to be a period of national emergency,

(Testimony of Angel Vidales.)

for the purpose of evading or avoiding training and service in the land or naval forces of the United States?

"A. Yes, that is true, but it was to please my parents. They did not want me to come."

Was that question asked of you and was that your answer? A. I don't remember.

(Reading.)

"Q. Did you know that the United States and Mexico were both engaged in a war during recent years against powerful enemies? A. Yes."

The Court: We will take a five minute recess.

(Recess.)

Mr. Grean: There is a question pending, your Honor.

The Court: Read the question.

(Question read by the reporter.)

Q. (By Mr. Grean): Was that question asked and was that your answer? A. No.

Q. You say that question was not asked of you and that was not your answer? A. Yes.

(Reading.)

"Q. Did you know who those enemies were? [25]

"A. Germany and Japan."

A. No.

Q. Was that question asked of you and was that your answer?

(Testimony of Angel Vidales.)

A. No. I answered I didn't know.

(Reading.)

"Q. Did you know approximately when that war began? A. About 1940."

That is at the top of page 6. A. No.

Mr. Grean: Did you ask him if that question was asked and if that was his answer, and his answer is "No"?

The Interpreter: Yes.

Q. (By Mr. Grean): "Q. Did you know when active hostilities in that war terminated?

"A. I think 1944, or 1945." A. Yes.

Q. That question was asked of you and that was your answer? A. Yes.

(Reading.)

"Q. Knowing that you were a citizen of the United States, and knowing that your country, the [26] United States, was engaged in a perilous war, did you feel no obligation, during the years 1942 to 1945, inclusive, to enter the United States to offer your services in the armed forces of your country? A. Yes."

A. Yes.

(Reading.)

"Q. Then why did you not do so?

"A. Because my parents would not let me on account of the war."

Was that question asked of you and was that your answer? A. Yes.

Q. Well, now, you have testified this morning,

(Testimony of Angel Vidales.)

Mr. Vidales, that you knew nothing about the war, and yet you now testify that this question was asked of you, "Then why did you not do so?" "Answer: Because my parents would not let me on account of the war." You testified that that question was asked of you and that was your answer. Now, how do you account for testifying you didn't know anything about the war, and this answer that you gave when you were questioned?

The Interpreter: Your Honor, that is a very long question.

The Court: Read it.

(Pending question read by the reporter.)

A. Well, I didn't remember about that, about the [27] question you are asking me now.

Q. (By Mr. Grean): Do you remember about the questions, now, Mr. Vidales, that they have been read to you? A. No.

Q. Obviously, Mr. Vidales, the questions and answers which you were purported to have given at the time of that hearing and your answers this morning differ. Do you have any explanation?

A. Well, I don't remember about all the questions.

Q. Well, are the answers to these questions that I have read to you correct?

A. I don't know, because I don't remember.

Q. I call another question to your attention:

"Q. What wages have you earned as an agricultural laborer in Mexico?

(Testimony of Angel Vidales.)

"A. Generally about two or three pesos a day." That is on page 3.

A. That is true.

Q. And yet you testified here this morning, Mr. Vidales, that you were not paid for your labor.

A. Well, after I was able to work, outside of the work of my father, when I would work that is what I would be paid, and that would be only once in a while, not very often.

Q. Do you speak and understand English, Mr. Vidales?

The Witness: No. [28]

A. (Through the Interpreter): No. I understand very little.

Mr. Grean: I have no further questions of this witness.

Mr. Widoff: Could I have this transcript? Thank you.

Redirect Examination

By Mr. Widoff:

Q. As I understand it, then, you did work occasionally, is that right, for wages?

A. Yes, but only once in a while.

Q. And did you ever save any money?

A. No.

Q. When you were asked these questions on these occasions that Mr. Grean just called your attention to, were they asked in Spanish or in English?

A. At that time, when I was there, I was only spoken to in Spanish.

(Testimony of Angel Vidales.)

Q. The questions were made in Spanish and the answers you gave were in Spanish?

A. Yes. We were only talking in Spanish then.

Q. Do you recall ever telling anybody at that time that you did not come to the United States because your parents did not want you to serve in the war? A. I don't remember.

Q. What did you say at that time respecting why you didn't come to the United States [29] sooner?

A. Well, that I have no money to come with.

Q. Did you tell anyone at that time that you knew that there was a war on at the time before you left the ranch?

A. Well, yes, I would hear people that would come to the town there talk about that, but that was in 1945, at the time when I wanted to come here.

Q. That is when you were coming, that is when you were on your way to the United States?

A. Yes, when I had all my plans and I was already at the town.

Q. And when you told them at that time, when you had been interrogated, that you knew the war was on, you were referring then to the time that you were on your way to the United States?

A. Yes, because when I was already at the town one could talk about the war, but before that I didn't know anything about it.

Q. You found out about who the enemies of the United States were when you were in this country?

(Testimony of Angel Vidales.)

A. Yes, Japan.

The Court: You are asking him leading questions and in your leading questions you are just tripping him into a contradiction of his own testimony. He just got through testifying that he learned it down there, in the town down there, and then you asked him a leading question and he answers it [30] "Yes," and he contradicted his own testimony.

Mr. Widoff: Well, I was just referring to who the enemies were, your Honor.

The Court: That is what you referred to before, and he said he learned who the enemies were down there in the Mexican town. Then you gave him a leading question and he contradicted his testimony.

Mr. Widoff: Pardon me. I asked him when he learned of the war. He said he learned of the war——

The Court: All right, you may proceed.

Q. (By Mr. Widoff): Did you know, when you were down in Zacatecas, in Mexico, in Juarez, I believe it was, did you learn who the enemies of the United States were at that time?

A. No, I didn't know that until I was here.

Q. At that time, when you heard them talk about the war, did you know who was fighting in the war —down in Mexico? A. No.

Q. What was it that you heard at that time when you were on your way down to the United States? What did you hear about the war?

(Testimony of Angel Vidales.)

A. Well, only that the United States was at war.

Q. Did you inquire as to who the war was between, who was fighting in a war?

A. No, I didn't inquire, but, you know, coming on the [31] bus they were talking about it there, and I heard about it on the train.

Q. Now, this place that you were living in, you said, was near Valpariso?

A. Yes, it was about 50 or 60 miles outside of the little town.

Q. When did you first make your plan to come to the United States, in relation to the time you left, how long before?

A. About eight months or nine or ten months or thereabouts.

Q. And before you made your plans, did you think about coming to the United States?

A. Yes.

Mr. Widoff: That is all.

Recross-Examination

By Mr. Grean:

Q. When you first heard about the war, on the bus, on the way to the United States, did you hear that the war was over?

A. They only talked about the war but they didn't say whether it had ended or not.

Mr. Grean: No further questions.

Mr. Widoff: That is all.

The Court: You may step down. [32]

Mr. Widoff: No further questions, your Honor.

Mr. Grean: Have you rested your case, Mr. Widoff?

Mr. Widoff: Yes.

(Whereupon the plaintiff rested his case in chief.)

(And thereupon the defendant, to maintain the issues on his behalf, offered and introduced the following evidence, to wit:)

Mr. Grean: I would like to call to the stand, please, Mr. Lloyd, Mr. R. J. Lloyd.

RALPH J. LLOYD

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name, please?

The Witness: Ralph J. Lloyd.

Mr. Grean: May I have marked for identification record of hearing certified by the Department of Justice?

The Clerk: Defendant's Exhibit A for identification. The whole thing or just this one page?

Mr. Grean: The portion that refers to the hearing only.

(The document referred to was marked Defendant's Exhibit A for identification.)

Direct Examination

By Mr. Grean:

Q. What is your occupation, Mr. Lloyd?

A. I am an immigrant inspector working in the

(Testimony of Ralph J. Lloyd.)

United [33] States Immigration and Naturalization Service at the present time.

Q. And what was your occupation on August 6, 1948?

A. At that time I also was an immigrant inspector, acting as chairman of the Board of Special Inquiry at the port of Calexico, California.

Q. I show you Defendant's Exhibit A for identification and ask you if you recognize that document?

A. Yes, I do.

Q. And what is it, Mr. Lloyd?

A. It is a copy of the record of the Board of Special Inquiry hearing held at Calexico, California, on August 6, 1948, with myself as chairman, F. K. Boynton as board member, and Elsie J. Willey as member and secretary.

Q. And who was interpreter at that time?

A. I was.

Q. And will you tell us the manner of the transcribing of the record which you have before you?

A. Briefly, a person who is held to appear before a board of special inquiry, at the time that they apply for entry into the United States, on the part of a primary inspector, or those cases in which the primary inspector cannot arrive at an honorable decision in a very short time, and he holds a person to appear before a board of special inquiry which consists usually of three [34] members.

Q. Is that what happened in this case?

A. Yes, sir, it is.

(Testimony of Ralph J. Lloyd.)

Q. Proceed.

A. And after the person is held to appear before a board of special inquiry, shortly thereafter they come before the board and at the board of special inquiry the order ordering the person to appear before the board is read into the record, which begins a board record.

The applicant is advised of the purpose of the board of special inquiry. He is asked as to whether he wants counsel, whether he wants friends or relatives present, he is given a choice of the language that the hearing will be held in, and the hearing proceeds with three members present. In this case two immigrant inspectors, one of them acting as board chairman and stenographer.

Q. Will you refer to the record now, please, and see if what you have just related was true also in this case? A. Yes, sir. It was.

Q. And you as interpreter asked the questions, Mr. Lloyd? A. Yes, sir.

Q. And the questions were first asked in English and translated into Spanish, and tell us just how that works.

A. The mechanics of that are that the board chairman gives the question first in English so the stenographer can [35] take it directly on the typewriter. Then, in this instance myself, the interpreter interprets the question to Spanish. Applicant answers the question, and the interpreter interprets the answer to English, and the board chair-

(Testimony of Ralph J. Lloyd.)

man, for the stenographer to take it down as it is interpreted from Spanish to English.

Q. Now, in interpreting the questions and answers, Mr. Lloyd, and if necessary you may refer to the record to refresh your memory, do you give the interpretation of everything that is said in the answer?

A. Yes, sir, we do that as literally as possible.

Q. And did you do so in this case?

A. I did.

Q. You say that because it is your custom to do that in all cases, or is there something about this case that refreshes your memory?

A. No. That is the way all cases are handled.

Q. I call your attention to the last page of Exhibit A, wherein it is stated, "Applicant's Departure to Mexico, Witnessed by Inspector Lloyd," and the signature thereon, "Ralph J. Lloyd." Is that your signature? A. Yes, sir.

Q. And what does that mean, Mr. Lloyd?

A. That means that the applicant's departure to Mexico was witnessed by the board chairman, myself in this instance, [36] and that the record is complete, the board record.

Q. Now, there is a further signature below that of yours, "Elsie J. Willey." Do your recognize that signature? A. Yes, sir, I do.

Q. And then there is a statement:

"I hereby certify that the foregoing to be a true and correct transcript of the testimony given in this hearing as taken by me directly on the type-

(Testimony of Ralph J. Lloyd.)

writer."

Now, do you know of your own knowledge that each question as translated by you, as stated by you in English, and the translation of the answer given, was transcribed correctly in that record?

A. Yes, sir, I do.

Q. You had occasion to read the record before the certification was made? A. Yes, sir.

Q. At the time when it was fresh in your memory? A. That is correct.

Q. Now, were any questions asked of the applicant for admission at that time, the plaintiff in this case, that were not recorded in that transcript?

A. If there were, I don't recall any. Usually all the questions and all the answers as complete as we can go into that record. [37]

Q. Were there any answers or questions which do not appear in the transcript?

A. I don't believe so.

Mr. Grean: I offer Defendant's Exhibit A for identification in evidence.

The Court: It may be received.

Mr. Grean: For the purpose of the contradictory statement therein called to the attention of the court.

The Clerk: Exhibit A in evidence.

Mr. Widoff: That is just for the purpose of the contradictory statements, is that correct, counsel?

Mr. Grean: That is correct, unless counsel wants to stipulate that the whole transcript be considered by the court.

(Testimony of Ralph J. Lloyd.)

Mr. Widoff: That is, I don't think it would be admissible otherwise except to impeach the witness.

The Court: It will be received. As a matter of fact, you did not mark the questions that were answered "No," did you?

Mr. Grean: I did not mark them, no.

(The document referred to, marked Defendant's Exhibit A, was received in evidence.)

Mr. Grean: I have no further questions, Mr. Lloyd.

Mr. Widoff: May I have a copy of that so I can question the witness? Thanks. I hope you have a copy there. [38]

Mr. Grean: Yes; I have one, thank you.

Cross-Examination

By Mr. Widoff:

Q. I notice there is a question on page 5 that was referred to, I believe, by counsel, in which the question reads:

"Since September 27, 1944, have you remained outside the jurisdiction of the United States, in time of war, or during a period declared by the President to be a period of national emergency, for the purpose of evading or avoiding training and service in the land or naval forces of the United States?"

Did you ask that question in Spanish or in English?

A. In Spanish. First in English and then later

(Testimony of Ralph J. Lloyd.)

in Spanish.

Q. Did you ask him if he knew the meaning of the word "jurisdiction"?

A. No, I did not.

Q. Did you ask him if he knew the meaning of the wording "national emergency"?

A. No, I did not.

Q. I notice a question there as follows:

"Why was it that he gave you permission to come to the United States, after October, of 1945, while [39] he would not before?"

That is referring apparently to the father. And the answer was:

"The only reason that I can give at this time was that I was so small."

That is the correct question and answer made at that time, would you say?

A. Yes, sir, I believe so.

Mr. Widoff: The question I just referred to, your Honor, is on page 5, the second question from the top.

The Court: Yes.

Q. (By Mr. Widoff): And on page 6 of this transcript there is a question:

"Did you know approximately when that war began?"

The answer is, "About 1940."

But do you recall whether that question had any relation to the time when he was supposed to have known that? He might have learned that while he was in the United States. Did you explain it to

(Testimony of Ralph J. Lloyd.)

him as to what time he was referring to, as to when he knew that the war began?

A. I don't——

Mr. Grean: May the witness refer to the statement, please? If your Honor please, I am going to object. The witness has testified that the questions and answers were in the record. Now counsel is asking for an explanation of [40] questions which do not appear in the record.

The Court: The question is argumentative.

Mr. Widoff: Well, what I meant to ascertain was whether he had explained to the witness at the time——

The Court: He has testified that it is all in here.

Mr. Widoff: Of course, some of these things, you know, can be off the record.

The Court: It is a matter of interpretation for the court as to what the meaning of it is.

Mr. Widoff: The only point I am trying to get at is, did he put any explanations off the record in the questions?

The Court: You can ask him that question, did he explain to him off the record.

Q. (By Mr. Widoff): In regard to this particular question I asked you, referred to just now, that is the second question from the top on page 6, did you off the record explain to him as to what time you were referring to or ask him to state the time that he learned of this information about when the war began?

A. I don't believe I gave him any further ex-

(Testimony of Ralph J. Lloyd.)

planation other than the questions that precede this one.

Mr. Widoff: That is all.

The Court: Mr. Reporter, there was a question when Mr. Grean was interrogating the plaintiff, which starts with, "Knowing that you were a citizen of the United States." See [41] if you can find that question.

(Record read by the reporter.)

The Court: You may step down.

I would like to ask the plaintiff a question.

ANGEL VIDALES

the plaintiff, recalled as a witness by the court, having been previously duly sworn, testified further through the interpreter as follows:

Examination

The Court: Now, when you were asked questions here just a few minutes ago, you were asked this question:

"Knowing that you were a citizen of the United States, and knowing that your country, the United States, was engaged in a perilous war, did you feel no obligation, during the years 1942 to 1945, inclusive, to enter the United States to offer your services in the armed forces of your country?"

And the answer was, "Yes."

And this morning, when you were asked if you were asked that question and if you did give that

(Testimony of Angel Vidales.)

answer, you stated, "Yes," you were asked that question and that you did give that answer.

Now, my question now is, what type of obligation did you feel in 1942 to 1945? What do you mean by you felt an obligation, 1942 to 1945? [42]

A. Well, in 1942 I did not know anything about those things.

In the first place, I didn't know anything, any laws at all and after that I didn't know anything—I didn't know much about anything. I was always around in the High Sierras.

The Court: But you just testified this morning that you said during 1942 to 1945, you felt an obligation to enter the United States to offer your services in the armed forces.

A. Was that in '44 or '45?

The Court: 1942 to 1945. Well, let me put it this way:

When was the first year that you felt the obligation to enter the United States to offer your services?

A. In '45.

The Court: And that was your intention, to come and offer your services in the armed forces?

A. Well, at that time I didn't even know yet whether it was my obligation to give my services or not.

But when I came to the border, that was the first thing they told me, that I had to give my services, and I told them yes, that I would.

(Testimony of Angel Vidales.)

The Court: When you were asked then, "Then why did you not do so?" Why did you answer, "Because my parents would not let me on account of the war"?

A. No, it wasn't; it wasn't; that wasn't on account of the war, because really they weren't really aware of that [43] themselves.

Because I had no means to move around, to travel; they couldn't tell me to go ahead, to go.

The Court: That is all.

Mr. Grean: The defendant rests.

(And thereupon the defendant rested his case.)

The Court: Any argument?

Mr. Widoff: Yes, your Honor, I would like to argue the matter.

The Court: For how long?

Mr. Widoff: For about five minutes is all.

The Court: All right.

Mr. Widoff: Your Honor, it appears to me that this man is telling the truth in so far as he said that he didn't know anything about this war. He was living on this ranch out in the High Sierras, he says, and was not aware of any laws or obligations. He was raised on a ranch where there was hardly anybody around there but his family. They are not people of education and they were isolated up there, and it appears to me from my knowledge of the Mexican people, and I have had them as clients for about 25 years, that that is a very plausible story.

I have had many instances of this type before, with people who are up in the mountains and on little ranches of that type, eking out an existence by growing this corn, who just didn't know what was going on in the rest of [44] the world for years at a time.

The only contact that they had with the outside world was once in a while when they would come in on horseback to some village in the vicinity to get supplies, and this boy was 60 to 70 miles from the nearest village of 500 people, and even the Mexican Government never had contact with these people or bothered to get them to register for military service or anything like that.

The Court: Mr. Widoff, his stories are so inconsistent, it is impossible to believe him.

Let us take, just for example, that last question, and of course he changed his story then from the time he was on the stand before, regardless of how you construe it, he testified as to that question, "Knowing that you were a citizen of the United States, and knowing that your country, the United States, was engaged in a perilous war, did you feel no obligation, during the years 1942 to 1945, inclusive, to enter the United States to offer your services in the armed forces of your country?" And the answer was, "Yes." He testified on cross-examination and that was one question he answered "Yes" to. There were some he said he didn't remember, but he did give that answer at that time.

Now, when I questioned him here, stating that it was between 1942 and 1945, he avoided the early

years and he said, "1945." But assuming that that is correct when he said [45] "1945," then I asked him, "When did you first feel the obligation to enter the United States?" And he said, "1945."

Then he was asked, "And is that why you left, because you felt that obligation in 1945?"

He had already testified previously that he never learned at all about this until after he had left there; in other words, the war was over. He never could have felt an obligation to enter the armed forces of the United States at a time of war because there was no war, if you believe his other story.

Now, in testifying before, he testified that he learned that the United States was at war. If we are to believe him, he wasn't even sufficiently interested to find out who this country was at war with. It is ridiculous that someone told him that the United States was at war and he wasn't sufficiently interested to find out who they were at war with. And yet he would tell us now that he felt an obligation to join the armed forces of the United States, although he was not sufficiently interested to ask who they were at war with. He just heard it. Perhaps it might have been a war with Mexico. It would have made a difference to him, if he was interested at all, because he lived most of his life in Mexico.

Now, could you believe a story like that if you didn't have an interest in the case? If you were sitting up where I am, could you believe a story like that? [46]

Mr. Widoff: Well, your Honor, I have known these Mexican people for a long time, and it makes a big difference in the way you receive these stories from these people. The more familiar and more intimate one is with these people, the better you can understand them, because they live in a whole lot different life, than a person who hasn't had so much contact with them as I have had.

The Court: Supposing he told me there was a war and I just shrugged my shoulders and wasn't interested? I don't believe that he wouldn't ask who they were at war with. But he was conscious of the fact at that time that he was an American citizen, and if an ordinary citizen would find out that the United States was at war, he would want to find out who they were at war with. I could believe an unusual person who would shrug his shoulders and not be interested, but he has testified that he felt an obligation to the United States.

Mr. Widoff: I don't believe he meant that. That question was a long question.

The Court: I am not referring to the question in the record of the other hearing. I am referring to the question that I asked him.

Mr. Widoff: That is true, but I don't believe that the witness even understood that question. I mean it is just too much for his mental capacity.

The Court: I took into consideration the fact that he [47] might not have understood the question itself. The fact that he answered that question in that way is a complete indictment of him, and the fact that he answered that question in that way in itself is sufficient. But I went back to the

very reason that you speak of, to make certain as to whether or not he had made a mistake and whether or not he understood it. He understood it very well. He immediately became very evasive as to the years.

But whether he has language difficulties or anything else, there aren't many people who can sit on a witness stand and tell a long story and go through all this, if they are not telling the truth, without having something jump up and bite them, and of course that is indicated here when, as I say, to get away from those early years because of the questions that have been subsequently asked, he then said, "1945." He doesn't say, though, that he never felt that obligation to enter the armed forces. So I asked him, "When did you feel the obligation to enter the armed forces?" Then he said, he did not know about it at that time, but when he first learned of the war down there, then he felt an obligation to enter the armed forces of the United States. I asked him if that was why he came back here. He said, "Yes," that is why he came back, because he felt the obligation to enter the armed forces.

Now, take that and put it alongside of his prior [48] testimony, when he testified just a few minutes ago, when you were examining him, that he heard about the war on the bus and on the train. You then asked him when did he first learn with whom we were at war, and he said in the United States or when he got over into the United States he learned from his relatives here in the United States. So then you straightened him out. You established the fact that when he learned this fact down on the train and bus he did not even inquire as to whom we were at war with.

So you end up with a man who is coming to the United States for the purpose of entering the armed forces because of his obligation to enter the armed forces of the United States, a man who discussed it with people on trains and busses and hears about the war on the trains and busses, and never inquires as to whom we are at war with. That is just too much for a trier of facts.

Mr. Widoff: Your Honor, let me just give you my version of this. I don't know whether it will impress you, your Honor, but I would like to get this off my chest, because I do feel sincerely, your Honor, that this boy was raised in this isolated place, and he had no feeling about a stituation of citizenship, he hardly knew what that thing was. That was a vague word that just didn't mean anything to him, it had no meaning at all as far as his feeling any obligation to the United States. He didn't even get any schooling. He didn't [49] even know what patriotism was or what loyalty was.

The Court: I agree with you 100 per cent, that is exactly true. That is exactly what happened. He felt no obligation at all to come back.

Mr. Widoff: That is right.

The Court: And he stayed down there to keep from going into the armed forces here. When he stated that he came back because he felt an obligation, I am not saying that is a true statement. It is just one more inconsistent statement. The significance of that is the same as the significance about the story he told about when he was on the bus and train, that he heard that the United States was at war and never asked who the United States

was at war with. Those things just don't happen. As I said, possibly it could happen with an unusual person who was a citizen of the United States and coming to the United States after a long absence and he hears someone talking about the war and they tell him the United States is at war, and he doesn't even ask anything about who they are at war with. He doesn't even ask that. It might have been Mexico that we were at war with. As I say, that standing alone is unbelievable. It could be from an unusual person, but we exclude even the unusual person when we take his other statement that he was on his way here because of his obligation to enter the armed forces.

Mr. Widoff: I don't believe that, your [50] Honor.

The Court: What do you believe?

Mr. Widoff: I believe this, that he heard that the United States was a good place to go to and make a nice living, that it was a land of milk and honey, like all other Mexican people who hear about the United States, and as soon as he was able to get enough money to go, from his parents, he just set out for the United States, and whatever he learned about the outside world he learned by talking to people on the way down here. He did stay with a cousin at the first town and then he stayed with another friend at Juarez, and he did learn those things at that time and then, when he came over here to register.

The Court: Counsel, there are some guideposts that are very true and they never vary in all the

cases we try. There is one thing you can be sure of, and that is, if he had learned those things at that time, about the same time, we wouldn't find these inconsistencies, he would have come right out and said it, and that pattern would be shown clearly in that transcript and it would be shown here, he would have said, "Yes, I knew before I left Mexico, I knew there was a war. I left my ranch up there, and I went down to see my cousin Pedro" at such and such a place, "and my cousin said, 'There is a war going on up there. You better not go up there or you will get into a war.' I said, 'Yes, I will go up there,' and I went over to see my cousin." In other words, [51] there would be a straight story and there wouldn't be all this evasiveness.

Take your theory. Of course you must be figuring that he forget to tell us that his cousin Pedro told him about a war when he was down there. That is the first thing he would be thinking of. If that had happened, if he had first learned about the war when he left the ranch and started here to get a job, to get better wages, and he learned from his cousin Pedro or from someone else about a war, the first time he spoke to these people at the border that is the first thing he would have said, and the first time when he came into your office it would have been the first thing he would have told you, and when he got on the stand he would have told the story here. So you know it didn't happen.

He started to testify on the stand this morning and his testimony to me was that he was completely in the dark and didn't know anything, that he was

out on a ranch there where he did not know anything, he was completely in the dark until of course, he was faced with these questions on cross-examination and was confronted with these questions which were asked down there. Then for a while he would say, "I don't remember," but then he picked up some of the questions and answered "Yes" to some of them, and even answered "No" to a few of them. But all that means is confusion when he is confronted with that. [52]

How could he remember here, as he sat here this morning, that he did say "Yes" when they asked him if he hadn't felt an obligation from 1942 to 1945, if he hadn't felt an obligation to enter the armed forces of the United States? And here this morning he said, "Yes," he did tell them.

Then, when he was asked these other questions, he said he didn't remember.

If he had a lapse of memory and could not remember anything down there, that would be different.

The Judgment will be for the defendant. Mr. Grean will prepare findings and present them to the court. [53]

[Title of District Court and Cause.]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified, and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and

correct transcript of the proceedings had in the above-entitled cause on Tuesday, July 14, 1953, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 9th day of October, A.D. 1953.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Endorsed]: Filed October 9, 1953. [54]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 27, inclusive, contain the original Petition for Declaration of United States Nationality, etc.; Answer to Plaintiff's Complaint; Pre-Trail Order; Minutes of the Court for July 14, 1953: Findings of Fact and Conclusions of Law; Objections to Proposed Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points on Appeal and Designation and Supplemental Designation of Record on Appeal which, together with Original Defendant's Exhibit A and Reporter's Transcript of Proceedings on July 14, 1953, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 9th day of October, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14076. United States Court of Appeals for the Ninth Circuit. Angel Vidales, also know as Angel Vidales-Galvan, Appellant, vs. Herbert Brownell, Jr., Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 12, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit

No. 14076

ANGEL VIDALES, Also Known as ANGEL VIDALES-GALVAN,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

STATEMENT OF POINTS

1. That the Court erred in adjudging that the Appellant is not a national or citizen of the United States, having expatriated himself by remaining outside of the jurisdiction of the United States, after September 27, 1944, in time of war and during a period declared by the President to be a period of national emergency, for the purpose of evading or avoiding training and service in the land or naval forces of the United States.

2. The Court erred in its receipt and rejection of evidence.

3. The evidence is insufficient to sustain the judgment.

/s/ J. WIDOFF,
Attorney for Appellant.

[Endorsed]: Filed October 26, 1953.

No. 14076.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANGEL VIDALES, Also Known as ANGEL VIDALES-GALVAN,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

APPELLANT'S OPENING BRIEF.

J. WIDOFF,
206 South Spring Street,
Los Angeles 12, California,
Attorney for Appellant.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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FOR THE NINTH CIRCUIT

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Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of the Facts.

Plaintiff and appellant, Angel Vidales, was born in Anaheim, California, on July 11, 1922, of parents who were citizens of Mexico. He was taken to Mexico when he was a child of about three in 1925, and remained in Mexico until January, 1946, when he returned to the United States.

He remained in the United States for about two years and then went back to Mexico on a visit, but when he tried to return to the United States he was excluded after a hearing by the Board of Special Inquiry for the alleged reason that he had expatriated himself for having remained outside of the United States in time of war for

the purpose of evading or avoiding training and service in the land or naval forces of the United States.

Thereafter he entered the United States and brought this action to determine his status as an American citizen. He denies having committed any act of expatriation.

The question in this case is whether or not the appellant has expatriated himself by evading training or service in the military forces of the United States. In this regard it is contended by appellant that he did not attempt to evade military training or service in the armed forces of the United States and that he was ignorant of any obligation to the United States until he had left his place of residence in Mexico.

The judgment of the court was to the effect that the plaintiff had expatriated himself by having wilfully evaded service in the miltary forces of the United States.

Appellant contends: (1) that said judgment is not supported by the evidence; (2) that the defendant had the burden of proof of showing that plaintiff had performed an act of expatriation and that defendant failed to meet this burden of proof.

Another question involved herein is whether it was proper for the court to receive in evidence the Transcript of the proceedings of the Board of Special Inquiry [Deft. Ex. A], it having been offered for identification only, and in this connection it is urged that in so doing the trial court committed error as a matter of law.

Appellant also raises the issue of the constitutionality of *any* law which would deprive a *native* born American citizen of his United States citizenship other than by voluntary renunciation

The issues in this case were raised by the petition and answer to the petition, plaintiff alleging that he was a citizen of the United States by birth, and that the defendants debarred him and excluded him from entering the United States. The answer admitted that plaintiff was born in the United States but denied that plaintiff was a citizen of the United States, upon the ground that plaintiff had expatriated himself and lost his United States nationality by remaining outside of the United States for the purpose of evading or avoiding training and service in the military forces of the United States during the time of war.

The findings of the court were to the effect that plaintiff was born in the United States and that plaintiff remained outside of the United States to evade or avoid training or service in the armed forces of the United States in time of war.

The conclusions of law were to the effect that plaintiff was born a citizen of the United States, but, having remained outside of the United States in time of war for the purpose of evading or avoiding training and service in the military forces of the United States, has expatriated himself under Section 401(j) of the Nationality Act of 1940 (8 U. S. C. 801(j)), and thereby lost his United States citizenship.

The plaintitff filed written objections to the findings of fact and conclusions of law, particularly that portion of the findings where the court found that the plaintiff had expatriated himself and particularly that portion of the conclusion of law wherein the court concluded that the plaintiff had lost his United States citizenship by expatriation.

Statement of the Pleadings.

1. The pleadings in this case consist of (1) petition filed by plaintiff [Tr. p. 3]; and (2) Answer filed by defendant [Tr. p. 5].

The jurisdiction of the United States District Court is derived from Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903).

Specfication of Errors.

1. The Court erred in adjudging that the appellant is not a national or citizen of the United States.

2. The Court erred in receiving in evidence defendant's Exhibit "A" despite an understanding that Exhibit "A" was offered in evidence for identification only and only as to a portion thereof.

3. The Court erred in making Finding No. V to the effect "That the plaintiff knew almost all of his life that he was a citizen of the United States, and that for more than fifteen years it was his intention to come to the United States."

4. The Court erred in making Finding No. VI to the effect "That the plaintiff knew that the United States was at war and that he had an obligation during the years 1942 to 1945, inclusive, to offer his services in the armed forces of the country, he having become twenty-one years of age in 1943."

5. The Court erred in making Finding No. VII to the effect "That the plaintiff remained outside the jurisdiction of the United States after September 27, 1944, to evade or avoid training and service in the armed forces of the United States, in time of war or during a period declared by the President to be a period of national emergency."

Summary of Argument.

Appellant was taken to Mexico at the age of three and resided on an isolated ranch until he departed for the United States; received no schooling; was ignorant of world affairs, politics or the nature of the obligations of a citizen of the United States until he reached the United States. His failure to register for military services in the United States was not wilful or intentional or voluntary, and this absence from the United States was not for the purpose of evading service in the military forces of the United States.

The government has the burden of proof to establish its case by clear and convincing evidence and has failed to do so.

An act of expatriation must be voluntary, and the evidence indicates that the appellant did not voluntarily evade his obligations as a citizen of the United States.

The findings and judgment of the Court to the effect that appellant had expatriated himself, thereby forfeiting his citizenship, are not supported by the evidence.

The Court erred in admitting Defendant's Exhibit "A," (consisting of the Transcript of the testimony of the Board of Special Inquiry held at Calexico, California) in view of the understanding that it was only offered for *identification* and solely for the purpose of impeachment with respect to certain portions thereof [Tr. pp. 50-51].

Section 401(j) of the Nationality Act of 1940 (8 U. S. C. A., 801(j), is unconstitutional.

ARGUMENT—AS TO FACTS.

Plaintiff and appellant, Angel Vidales, was born in Anaheim, California, on July 11, 1922, of parents who were citizens of Mexico. He was taken to Mexico in 1925, and remained in Mexico until January, 1946, when he returned to the United States.

Plaintiff was taken to Mexico by his parents when about three years old and went to live on ranches in the "Sierras" and resided there with his parents until coming to the United States the first time [Tr. of Rec. p. 22].

These ranches were between 50 and 70 miles from the nearest town or village [Tr. of Rec. pp. 22-23].

Plaintiff was engaging in planting corn. He did not attend school, but when he grew up he was taught to write by his mother [Tr. of Rec. p. 23].

Plaintiff occasionally went to the nearest village on horseback, usually about every fourth or fifth month, accompanied by his father, to obtain provisions. It was about an eight hour ride to the village [Tr. of Rec. pp. 23-24].

He learned that he was born in the United States when he was about 12 or 14 years of age through conversations between his parents [Tr. of Rec. p. 24].

He did not know that the United States was at war while living on the ranch [Tr. of Rec. p. 24], but learned of it in town in 1945 [Tr. of Rec. p. 31].

When he became of age he got the idea of wanting to come to the United States, as he heard people talk about coming to the United States and wanted to do likewise, but he didn't have the means of making the trip [Tr. of Rec. pp. 24-25].

Eventually he got the money to go to the border from his father [Tr. of Rec. pp. 25-26].

As he had little or no money of his own [Tr. of Rec. p. 26].

He set out to the United States on horseback to a nearby town accompanied by his father. At Valpariso Valle, Zacatecas he parted from his father and took a bus to another town named Frensillo where he had a cousin with whom he stayed for two weeks. From Frensillo he took another bus to Canitas where he boarded the train and went by train from Canitas to Juarez. In Juarez he went to the home of a friend of his father, whose address had been given to him by his father, and disclosed to this friend his intentions of coming to the United States. This friend directed him to the customs house at the border where he presented his baptismal certificate which was the only document he had in his possession [Tr. of Rec. pp. 26-27].

He was then directed to the American Consulate where he obtained a certificate to cross into the United States [Tr. of Rec. p. 27].

He crossed into the United States in 1946 [Tr. of Rec. pp. 27-28].

After crossing into the United States *he registered for military service* [Tr. of Rec. p. 28].

He learned about the law requiring his registering for military service from a cousin whom he met in the United States [Tr. of Rec. p. 28].

He did not know about any of the laws of the United States prior to his coming into the United States [Tr. of Rec. p. 28].

After coming to the United States in 1946 he remained here for approximately two years before crossing to Mexico voluntarily, and when he tried to return he was not allowed to do so [Tr. of Rec. pp. 28-29].

The record shows that the plaintiff was excluded from the United States when he attempted to re-cross [Tr. of Rec. p. 29].

(In Transcript of Record, page 43, plaintiff explains that whenever he said he knew about the war he was referring to 1945 when he was on his way to the United States. In Transcript of Record, pages 55 and 56, plaintiff explains to the court that he did not know the meaning of the question about his obligation to the United States and also that his parents did not know about the war.)

ARGUMENT—AS TO LAW.

Burden of Proof.

Plaintiff make a *prima facie* case by alleging and proving his birth in the United States, and then *the government has the burden of showing that plaintiff has performed an act of expatriation.*

Pandolfo v. Acheson, 202 F. 2d 38 (2d Cir., 1953).

Act of Expatriation Must Be Voluntary.

In a proceeding to establish expatriation of a native-born citizen, the government must establish its case by clear, unequivocal and convincing evidence. Expatriation of a native-born citizen can be accomplished only by a voluntary act which indicates relinquishment of his American nationality in favor of allegiance to some foreign state.

There must be more than inference, hypothesis or surmise before a native-born citizen can be stripped of his citizenship, notwithstanding that the government has difficulty in obtaining the necessary proof in cases of this kind.

Acheson v. Maenza, 202 F. 2d 453 (D. C. 1953).

In this case the plaintiff voted because of a fear of displeasing the occupation authorities who might interfere with her plans to return to the United States, which resulted in an involuntary act on her part and which did not bring about expatriation.

Kasumi Nakashima v. Acheson, 98 Fed. Supp. 11, (D. C. S. D. Calif., D. C. June 22, 1951).

On the evidence in the case, the Court found that both the service in the Japanese Army and the acceptance of the teaching position were involuntary. Consequently, no expatriation ensued by reason of those acts.

Noboru Kanbara v. Acheson, 103 Fed Supp. 565, (D. C. S. D. Calif. Cent. Div., Jan. 30, 1952).

Plaintiff returned to Canada in order that she might take care of her aged and infirm mother, who needed constant personal care and attention. The Department of State having certified that she had lost her United States citizenship under Section 404(b) of the Nationality Act of 1940, by reason of residence abroad for three years in the country of her birth, a Section 503 action was brought.

The Court gave judgment for the plaintiff, holding: (1) Plaintiff's intention was not the vital test; (2) However, the true test was whether her stay in Canada was

a voluntary act; (3) A "voluntary act" was one which proceeded from one's "own choice or full consent unimpelled by another's influence"; further, that "the means of exercising duress is not limited to guns, clubs, or physical threats; the fear of loss of access to one's country, like the fear of loss of a loved one, can be more coercive than the fear of physical violence (citing *Kasumi Nakashima v. Acheson,* 98 Fed. Supp. 11); (4) The facts which impelled the plaintiff in this case to stay in Canada from time to time indicated that such absence from the United States was involuntary.

Rychman v. Acheson, 106 Fed. Supp. 739, (D. C. S. D. Tex. Houston Div., March 27 1952).

Error to Admit Exhibit "A".

On appeal, the Circuit Court in reversing, stated that the declaratory judgment action is an independent action or a review *de novo* of the administrative proceeding. Therefore, the copy of testimony given by the alleged uncle at the administrative hearing was not admissible as evidence before the District Court over objection.

Wong Wing Foo v. McGrath, 196 F. 2d 120 (9th Cir., 1952).

Clear and Convincing Evidence Required.

The Court gave judgment for the plaintiff, holding: (1) The evidence offered to sustain a claim that plaintiff had voted in Mexico was legally insufficient; (2) It is common knowledge that persons of Mexican extraction, who are illiterate, are always agreeable with those in authority, and generally feel that it is impolite to disagree; (3) The evidence to establish expatriation must be clear,

certain and overwhelming, which is not the degree of evidence offered in this case by the defendant.

Nieto v. McGrath, 108 Fed. Supp. 150, (D. C. S. D. Texas, Laredo Div., March 31, 1951).

(Note: In a later case the same Judge followed the *Nieto* case above reported, in holding that expatriation had not resulted under similar circumstances. *Martinez v. McGrath,* 108 Fed. Supp. 155, (D. C. S. D. Texas, Brownsville Div., Oct. 29, 1952).)

Court finds evidence of citizenship contrary to ruling of Board of Special Inquiry. A Board of Special Inquiry ruled that the person before it was not a United States citizen; on appeal, the ruling was sustained by the Commissioner and the Board of Immigration Appeals. Thereafter a declaratory judgment action was brought to obtain a judicial determination of United States citizenship.

The Court held: (1) Plaintiff's testimony before the Board of Special Inquiry was so confused and contradictory that the action of the Board was readily understandable; (2) Where the testimony of a witness having great interest in the outcome of the proceedings is not only contradictory, but in part clearly wrong, the trier of the facts very naturally cannot give the weight to his testimony which otherwise it would require; (3) However, other evidence adduced at the trial, such as proof that over a long period the father made substantial remittances to the plaintiff, and the lack of any evidence to the contrary, led the Court to feel that plaintiff was the son of an American citizen, and, as such, a United States citizen. Judgment for plaintiff.

Eng Bok Chum v. Brownell, 111 Fed. Supp. 454, (D. C., D. C., April 22 1953).

The appellant urges that Section 401(j) of the Nationality Act of 1940 is unconstitutional upon the same reasoning that was used in the cases hereinafter cited. Section 401(c) and (e) of the Nationality Act of 1940 was held unconstitutional in the following cases:

Kiyokuro Okimura v. Acheson; and

Hisao Murata v Acheson, 111 Fed. Supp. 303 and 306, (D. C. Hawaii, April 1, 1953).

Wherefore it is prayed that judgment be reversed.

Respectfully submitted,

J. Widoff,

Attorney for Appellant.

No. 14076.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANGEL VIDALES, also known as ANGEL VIDALES-GALVAN,
Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,
Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,
ROBERT K. GREAN,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellee.

BRIEF FOR APPELLEE.

I.

JURISDICTION OF THE COURT.

The District Court had jurisdiction of the action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903). [Tr. 11.]

Judgment for the defendant was docketed and entered on August 11, 1953, and the jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C., Section 1291.

II.

STATEMENT OF THE CASE.

Appellant, having been denied admittance to the United States by an excluding decision of the Immigration and Naturalization Service holding him to have expatriated himself, sought a declaration of nationality from the District Court of the United States for the Southern District of California.

Said District Court determined that though the appellant was a citizen by birth in the United States, he subsequently expatriated himself under Section 401(j) of the Nationality Act of 1940, as amended (8 U. S. C. A. 801(j)) by remaining outside the jurisdiction of the United States since September 27, 1944, for the purpose of avoiding or evading training and service in the Armed Forces of the United States in time of war [Tr. 13] and the Court ruled in favor of the defendant and adjudged that the appellant is not a national or a citizen of the United States. [Tr. 16.]

III.

STATUTES INVOLVED.

Section 401(j) of the Nationality Act of 1940 (8 U. S. C. A. 801(j)) provides in pertinent part as follows:

> "§801. *General means of losing United States nationality.*
>
> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * * * * *
>
> (j) Departing from or remaining outside the jurisdiction of the United States in time of war or dur-

ing a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States. As amended Jan. 20, 1944, c. 2, §1, 58 Stat. 4; July 1, 1944, c. 368, §1, 58 Stat. 677; Sept. 27, 1944, c. 418, §1, 58 Stat. 746."

IV.

STATEMENT OF FACTS.

The appellant was born in the United States at Anaheim, California, on July 11, 1922, which event made him a citizen of the United States by virtue of Amendment 14 of the Constitution. When he was about three years old, his parents moved to Mexico taking him with them. The appellant remained in Mexico until about January, 1946, when he returned to the United States. He remained in the United States until about July, 1948. [Tr. 8.] He knew almost all of his life that he was a citizen of the United States, and for more than fifteen years it was his intention to come to the United States. He also knew that the United States was at war and that he had an obligation during the years 1942-1945, inclusive, to offer his services in the Armed Forces of the country, he having become twenty-one years of age in 1943. [Tr. 12.]

Appellant left the United States in 1948, and when he sought to return the same year, he was excluded by the Immigration Service when it was determined after hearing that he had forfeited United States citizenship by remaining outside the jurisdiction of the United States for the purpose of avoiding or evading training and service in the Armed Forces of the United States in time of war. [Tr. 9.]

V.
QUESTIONS INVOLVED.

Specifications of Error listed by the appellant in his Opening Brief as Nos. 1, 3, 4 and 5 are all questions of fact raising the sole factual question:

Did the appellant, as a matter of fact, expatriate himself by remaining outside the jurisdiction of the United States for the purpose of avoiding or evading training and service in the land or naval forces of the United States?

Specification of Error No. 2 by the appellant raises a question as to the admissibility of evidence which may be stated:

Are previous statements of a party to an action, conflicting with his present testimony admissible against him, and do they constitute substantive evidence against him?

VI.
ARGUMENT.

A. The Court Properly Received in Evidence Defendant's Exhibit A.

This question while last stated under "Questions Involved" above should be taken up first, as no discussion of the evidence will be pertinent unless it is first determined that it is admissible and has probative value.

Defendant's Exhibit A consists of a transcript of appellant's testimony before a Board of Special Inquiry held at Calexico, California, on August 6, 1948, at which time appellant's right to enter the United States was being determined.

The previous testimony of the appellant as contained in Exhibit A was first called to the attention of the appellant and first entered the case in the cross-examination of the appellant [Tr. 31], and in each case where appellant's testimony in the trial differed from his testimony as contained in Exhibit A, the question was read to him together with his answer and he was then asked if that question was asked and if that was his answer. [Tr. 32-42.]

Exhibit A was then marked for identification, and the Clerk asked "The whole thing or just this one page?" He was answered "The portion that refers to the hearing only." [Tr. 46.] And thereupon Ralph J. Lloyd, Chairman of the Board of Special Inquiry who acted as Spanish interpreter at said hearing, testified as to the authenticity and correctness of the transcript, and explained in detail how the testimony therein was taken. At the close of Mr. Lloyd's cross-examination [Tr. 50], the following took place:

> "Mr. Grean: I offer Defendant's Exhibit A for identification in evidence.
>
> The Court: It may be received.
>
> Mr. Grean: For the purpose of the contradictory statements called to the attention of the Court.
>
> The Clerk: Exhibit A in evidence.
>
> Mr. Widoff: That is just for the purpose of the contradictory statement, is that correct, counsel?
>
> Mr. Grean: That is correct, unless counsel wants to stipulate that the whole transcript be considered by the Court.
>
> Mr. Widoff: That is, I don't think it would be admissible otherwise except to impeach the witness.

The Court: It will be received. As a matter of fact, you did not mark the questions that were answered 'no.' Did you?

Mr. Grean: I did not mark, them no." [Tr. 50-51.]

Counsel for the appellant cites *Wong Wing Foo v. McGrath,* 195 F. 2d 120 (C. A. 9th, 1952), in support of his contention that it was error to admit Exhibit A. In that case, however, the testimony of an alleged uncle before an administrative hearing was sought to be introduced as evidence while the uncle was available to testify as a witness.

His testimony was clearly hearsay. He was not a party to the action and the Court held that the exception to the Hearsay Rule where such a witness is dead or otherwise not available was not applicable. The inadmissibility of the uncle's testimony was obvious. There was no opportunity for him to be cross-examined on his previous testimony.

However, in the instant case, we are not dealing with testimony of third persons given in another action. We are dealing here with admissions of the appellant, a *party* to the action present in court with an opportunity to explain the previous statements now conflicting with his present testimony.

Wigmore in Volume IV, page 4 of his works on Evidence (3rd Ed.) states:

> "The Hearsay Rule, therefore, is not a ground of objection when an opponent's assertions are offered *against* him; in such case, his assertions are termed admissions."

Wigmore states that the probative value of admissions is twofold:

First, all admissions, may furnish, as against the opponent the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction; and

Second, all admissions, used against the opponent, satisfy the Hearsay Rule, and when once in, have such testimonial value as belongs to any testimonial assertion under the circumstances.

> "* * * an admission is equivalent to affirmative testimony for the party offering it."
>
> IV, Wigmore on Evidence, Sec. 1048, p. 6.

Previous statements of the party to an action, conflicting with his testimony, constitute substantive evidence against him.

> *Harrison v. United States,* 42 F. 2d 736 (C. A. 10th, 1930).

The Rule authorizes the receipt of any statement made by an opponent as evidence in contradiction and impeachment of his present claim. Evidence offered to prove admissions need not have been given in a courtroom or under oath but the fact that it was so given, does not detract from its admissibility.

> *Milton v. United States,* 110 F. 2d 556, 560 (C. A. D. C., 1940).

See also:

> *Warde v. United States,* 158 F. 2d 651 (C. A. D. C., 1946).

And particularly:

> *Schoeps v. Carmichael,* 177 F. 2d 391 (C. A. 9th, 1949),

in which Judge Bone in a footnote No. 11 at page 397 enunciates completely the proposition stated above.

Not only are the courts consistent in ruling upon the admissibility of admissions, but they emphasize the probative value thereof or as Wigmore says:

> "An admission is equivalent to affirmative testimony for the party offering it."

The Court in *Harrison v. United States, supra,* states that such testimony constitutes substantive evidence while the Court in *Milton v. United States, supra,* states at page 560:

> "Admissions have probative value, not because they have been subjected to cross-examination and therefore satisfy the Hearsay Rule, but because they are statements by a party opponent inconsistent with his present position as expressed in his pleadings and testimony."

Thus, we see that not only was Exhibit A admissible, but it was equivalent to affirmative *testimony* for the party offering it.

B. Appellant, as Matter of Fact, Remained in Mexico to Avoid or Evade Military Service Within the Meaning of 401(j) of the Nationality Act of 1940 (8 U. S. C. A. 801(j)).

Exhibit A with which appellant was confronted as his previous statements, is inconsistent with his present testimony, and which the Court obviously chose to believe, presents the following evidence:

That appellant knew almost all his life that he was a citizen of the United States; that he desired and intended to come to the United States for fifteen years more or less. [Ex. A, p. 8.] That although he was twenty-one years of age and a grown man in 1943, his father would not give him permission to come to the United States because he knew that he would have been liable for service in the Armed Forces of the United States. [Ex. A, p. 9.] That after reaching the age of twenty-one years, he could have come to the United States at any time, but his parents would not let him come on account of the war. "They were afraid to have me enter the United States Armed Forces"; that he remained in Mexico until after the war to comply with the wishes of his parents and remained outside the jurisdiction of the United States in time of war for the purpose of evading or avoiding training and service in the land or naval forces of the United States to please his parents [Ex. A, p. 10]; that he knew that the United States and Mexico were engaged in war against Germany and Japan and that the war be-

gan about 1940 and terminated in 1944 or 1945 [Ex. A, p. 11]; that he felt an obligation during the years 1942-1945, inclusive, to enter the United States to offer his services in the Armed Forces of the country but did not do so because "my parents would not let me on account of the war." [Ex. A, p. 12.]

The foregoing were appellant's admissions. He attempts to contradict said testimony by stating to the Court that he lived in the back country of Mexico, heard nothing of the war until he got on the bus to come to the United States in 1945, and that he learned while he was on the bus that America was at war, and that he did not learn who America was at war with until he arrived in the United States.

Obviously, the Court disbelieved this testimony, for as the Court states at page 57 of the transcript of record:

> "Mr. Widoff, his stories are so inconsistent, it is impossible to believe him."

The Court was the sole judge of the credibility of the witness and had a right to determine whether the witness had testified properly at the trial or had testified properly before the Board of Inquiry hearing. Having determined this question of fact, this Court will find ample evidence to support it, and appellee will spend no further time on this question.

C. Constitutionality.

Appellant finally relies upon the decision of the District Court in *Okimura v. Acheson,* and *Murata v. Acheson,* 111 F. Supp. 303 and 306, for the proposition that Section 401(j) of the Nationality Act of 1940 is unconstitutional. This decision nullifies the considered judgment of Congress as to the conditions under which a citizen of the United States by birth may lose his American nationality.

The decision completely disregards the decision of the Supreme Court which have implicitly or explicitly rejected the premises upon which the opinion rests.

> *Savorgnan v. United States,* 338 U. S. 491;
> *Mackenzie v. Hare,* 239 U. S. 299.

See also:

> *Ex parte Griffin,* 237 Fed. 445 (N. D. N. Y.).

In *Miranda v. Clark,* 180 F. 2d 257, this United States Court of Appeals for the Ninth Circuit held that Section 401(e) of the Nationality Act of 1940 providing for loss of citizenship by voting in a political election in a foreign state was constitutional. It ruled that the provisions of the statute:

> "Bind the Courts unless it can be said that they are clearly unconstitutional, a conclusion without rational foundation."

VII.
CONCLUSION.

The District Court in the instant case has passed on the credibility of the witness and the weight to be given his testimony. Inferences drawn from facts in evidence created a conflict which it was the duty of the trier of facts to resolve.

Cohen v. C. I. R., 148 F. 2d 336 (C. A. 2);
Elzig v. Gudwangen, 91 F. 2d 434 (C. A. 8);
Gibson v. So. Pac. Co., 67 F. 2d 758 (C. A. 5);
Quock Ting v. United States, 140 U. S. 417.

Wherefore appellee prays that the judgment of the District Court be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT K. GREAN,
Assistant U. S. Attorney,

Attorneys for Appellee.

No. 14078

United States
Court of Appeals
For the Ninth Circuit.

WEST COAST PRODUCTS CORPORATION,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-23-53

No. 14078

United States
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WEST COAST PRODUCTS CORPORATION,

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Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-29-54

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

ALBERT PICARD, ESQ.,
405 Montgomery Street,
San Francisco, California,

For Appellant.

A. T. SUTER, ESQ.,

F. E. FUHRMAN, ESQ.,

65 Market Street,
San Francisco 5, California,

For Appellee.

EXCERPTS FROM CIVIL DOCKET ENTRIES

1950

May 4—Filed proceedings transferred from Northern Division.

Oct. 31—Filed answer, with demand for jury.

1952

Mar. 12—Filed motion by plaintiff for summary judgment.

Aug. 25—Ordered motion for summary judgment denied.

1953

Mar. 24—Filed request by plaintiff for admissions.

Apr. 28—Filed admissions by defendant to request by plaintiff.

May 11—Jury trial. Jury impaneled. The Court held that no question of fact for jury to decide, and on stipulation, case submitted to the Court on briefs. Jury discharged.

May 26—Filed motion by defendant to set aside submission and reopen trial.

June 5—Ordered motion to set aside submission denied.

July 10—Filed order for judgment in favor of plaintiff.

July 23—Filed findings of fact and conclusions of law.

July 23—Filed Judgment for plaintiff vs. defendant in sum of $1,519.77, with interest at 6% and costs.

1953

July 24—Entered judgment.
Aug. 1—Filed motion for new trial.
Aug. 7—Filed order denying motion for new trial.
Sept. 3—Filed notice of appeal by defendant.
Sept. 4—Filed appeal bond in sum of $250.00.
Sept. 30—Filed reporter's transcript of proceedings of May 11, 1953.

In the District Court of the United States in and for the Northern District of California, Northern Division

No. 6302

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff,

vs.

WEST COAST PRODUCTS CORP., a Corporation,

Defendant.

COMPLAINT FOR FREIGHT CHARGES

Plaintiff complains of defendant and for cause of action alleges:

I.

This action arises under a law of the United States regulating interstate commerce in that it arises under Section 6(7) and other sections of Part I of the Interstate Commerce Act of which this court has jurisdiction under Title 28, United States Code, Section 41, Subdivision (8);

II.

Plaintiff is now and was during all of the times hereinafter mentioned a corporation duly created, organized and existing under the laws of the State of Delaware, authorized to do and doing business in the State of California and elsewhere and, as such corporation, was during all of said times engaged as a common carrier by railroad in the transportation of persons and property for hire in interstate commerce over its lines and in participation with other common carriers by railroad in and through various states of the United States;

III.

That defendant, West Coast Products Corp., is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City of Orland, County of Glenn, State of California;

IV.

That within two years last past defendant became and is now indebted to plaintiff in the sum of $1,475.51 as and for undercharges on various shipments of salt cured olives transported by plaintiff and its connecting carriers at the special instance and request of defendant from Orland, California, consigned to and delivered at various Eastern destinations, as evidenced by statement attached hereto, marked Exhibit A and made a part hereof, and to which reference is hereby made; that the transpor-

tation charges due on account of the transportation of said shipments, as aforesaid, in accordance with and pursuant to plaintiff's tariffs at all times herein mentioned duly posted, published and on file with the Interstate Commerce Commission, were the sum of $5,447.64, no part of which has been paid except the sum of $3,972.13; that plaintiff and its connecting carriers have duly performed each and every act on their part to be performed; that although demand has been made upon defendant for said charges, payment has been refused, and there is now due, owing and unpaid from the defendant to the plaintiff herein the sum of $1,475.51;

V.

That by reason of certain applicable provisions of the Internal Revenue Act there have accrued on account of said transportation charges aforementioned taxes due to the United States of America in the sum of $44.26, which by law the plaintiff is required to collect and pay over to the United States.

Wherefore, plaintiff prays judgment against the defendant in the sum of $1,475.51 with interest thereon, and in the further sum of $44.26 on account of Federal transportation taxes, for its costs of suit, and for such other and further relief as to the court may seem just and proper.

DEVLIN & DEVLIN &
DIEPENBROCK,

/s/ A. T. SUTER,
Attorneys for Plaintiff.

EXHIBIT A

UNCOLLECTED FREIGHT CHARGES

YUF 1548

Debtor: West Coast Products Co.

From	To	F/B No.	No.	Waybill Date	Int.	Car No.	Commodity	Weight	Tariff Charges	Freight Bill No.	Amount Collected	Balance Due
Orland, Calif.	New York, N.Y	SP 12	SP 12	Mar. 8, 1948	Penn	104387	Olives	61080	1304.66		938.18	366.48
"	"	SP 20	SP 20	Mar. 17, 1948	Wab	86233	"	61440	1312.36		943.72	368.64
"	Cleveland, Ohio	SP 38	SP 38	April 6, 1949	TNO	59444	"	71208	1403.82		1061.37	342.45
"	Buffalo, N.Y.	SP 39	SP 39	April 7, 1949	SP	81989	"	60000	1426.80		1028.86	397.94
									5447.64		3972.13	1475.51
											Tax	44.26
												1519.77

[Endorsed]: Filed March 20, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS PRESENTING DEFENSE OF FAILURE TO STATE A CLAIM

The defendant herein moves the above-entitled Court to dismiss the above-entitled action because the complaint fails to state a claim against said defendant upon which relief can be granted.

/s/ ALBERT PICARD,
Attorney for Defendant.

NOTICE OF HEARING MOTION

To: Messrs. Devlin & Devlin & Diepenbrock,
Attorneys for Plaintiff.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at its Courtroom in the United States Post Office Building, City of Sacramento, County of Sacramento, State of California, on Monday, the 24th day of April, 1950, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

Dated: April 12, 1950.

/s/ ALBERT PICARD,
Attorney for Defendant.

Authority:

Rule 12(b) of the Rules of Civil Procedure for the United States District Courts.

[Endorsed]: Filed April 13, 1950.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF VENUE UNDER RULE 12(b) OF THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURT

The defendant herein moves the above-entitled Court to transfer the above-entitled action to the District Court of the United States for the Northern District of California, Southern Division, from the Northern Division of said Court and District on the ground that the defendant is a corporation incorporated under the laws of the State of California with its principal place of business and office in the City and County of San Francisco, State of California, which said City and County is located in the Southern Division of the Northern District of California, and is the proper place for the trial of an action against an inhabitant of the said City and County of San Francisco, in said Southern Division.

/s/ ALBERT PICARD,
Attorney for Defendant.

NOTICE OF HEARING MOTION

To: Messrs. Devlin & Devlin & Diepenbrock,
Attorneys for Plaintiff.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at its Courtroom in the United States Post Office Building, City of Sacramento, County of Sacra-

mento, State of California, on Monday, the 24th day of April, 1950, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

Dated: April 12, 1950.

/s/ ALBERT PICARD,
Attorney for Defendant.

Authorities:

Sanders vs. Royal Indemnity Co., Inc., 33 Fed. (2d) 512; Title 28, Sec. 114, Federal Code Annotated.

[Endorsed]: Filed April 13, 1950.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 24th day of April, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Dal M. Lemmon,
District Judge.

[Title of Cause.]

MINUTES OF APRIL 24, 1950

After hearing Horace B. Wulff, Esq., it is Ordered that the motion for change of venue be submitted and the other motions be held in abeyance until decision is made on change of venue.

Certified true copy.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Dal M. Lemmon,
District Judge.

[Title of Cause.]

MINUTES OF MAY 2, 1950

These cases having heretofore been submitted on motion for change of venue under Rule 12 (b), it is Ordered that they be transferred to the Southern Division of the Northern District of California for trial, and continuing generally all motions, other than the motion to transfer, to the Southern Division.

Certified true copy.

[Title of District Court and Cause.]

ANSWER

Defendant for answer to the complaint on file herein:

I.

Denies that defendant has its principal place of business in the City of Orland, County of Glenn, State of California, and in that behalf alleges that said defendant has its principal place of business in the City and County of San Francisco, State of California.

II.

Answering paragraph IV of said complaint said defendant admits that it caused plaintiff to transport olives but denies that the olives were salt-cured, and in that behalf alleges that the olives transported by plaintiff for defendant were oil-coated olives, and, except as herein admitted, denies each and every allegation contained in paragraph IV of said complaint, and in that behalf said defendant denies that there is any sum whatsoever due or owing or unpaid from it to plaintiff and alleges that the sums paid to said plaintiff were the full sums due and payable to said plaintiff for the shipments referred to in said complaint and that plaintiff has been fully paid.

III.

Denies each and every allegation contained in paragraph V of said complaint and in that behalf alleges that if any amount is due to the United States of America for taxes the obligation to pay the same is upon plaintiff and not upon this answering defendant.

Wherefore, said defendant prays that plaintiff take nothing by this action and that it have judgment against said plaintiff for its costs of suit incurred herein.

/s/ ALBERT PICARD,
Attorney for Defendant.

State of California,
City and County of San Francisco—ss.

Albert Picard, being first duly sworn, deposes and says:

That he is the President of West Coast Products Corporation, the defendant named in the foregoing Answer, and makes this verification for and on behalf of said corporation; that he has read said answer and knows the contents thereof, and that the same is true except as to matters which are therein stated upon information or belief and that as to those matters he believes it to be true.

/s/ ALBERT PICARD.

Subscribed and sworn to before me this 30th day of October, 1950.

[Seal] /s/ CHILMER MUNDAY,
Notary Public in and for the City and County of San Francisco, State of California.

Defendant hereby demands a trial by jury of the above-entitled action.

/s/ ALBERT PICARD,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 31, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Above-named Defendant and to Albert Picard, Attorney for Said Defendant:

You, and each of you, are hereby notified that on Monday, the 24th day of March, 1952, at the Courtroom of the above-entitled Court in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, the above-named plaintiff will present to the Court its motion for the entry of Summary Judgment in its favor in this cause.

Said motion for Summary Judgment will be based upon the provisions of Rule 56 of the Federal Rules of Civil Procedure; upon all the papers, files and pleadings in this action; upon the Affidavits of Emmet Murray and E. J. Swanson, copies of which are attached to this notice and herewith served upon you; and in particular upon each and all of the grounds specified in plaintiff's Memorandum of Points and Authorities in support of said motion, a copy of which is also attached hereto and herewith served upon you.

Dated at San Francisco, California, March 12, 1952.

/s/ A. T. SUTER,
Attorney for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT OF EMMET MURRAY

State of California,
City and County of San Francisco—ss.

Emmet Murray being duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in Alameda County, California. My office headquarters are 65 Market Street, San Francisco.

I have been employed by Southern Pacific Company in various capacities for more than 31 years. My present position is Chief Clerk, Revising Bureau in the Office of Auditor of Freight Accounts at San Francisco, California. I have been employed in the present capacity for the past 4 years. My duties in the said employment for Southern Pacific Company include the supervision of and checking various waybills covering shipments made over the lines of Southern Pacific Company and its connecting carriers for the purpose of ascertaining whether freight charges have been assessed and collected on such shipments in accordance with applicable tariff provisions. In the performance of my duties it is necessary that I be, and I am, familiar with the tariffs of Southern Pacific Company and its connecting carriers lawfully on file with the Interstate Commerce Commission.

In the course of my duties I became and I am familiar with the circumstances surrounding the assessment of freight charges on four carload shipments of olives which were tendered by West Coast Products Company to Southern Pacific Company during March, 1948, and April, 1949, at Orland, California for transportation from that point via Southern Pacific Company and its connecting carriers to various eastern destinations. The four shipments referred to are listed in the statement attached hereto and marked Exhibit "A." Photostat copies of shipping orders issued by Freight Agent of Southern Pacific Company at Orland, California covering the said four shipments are attached hereto and marked Exhibits B-1, B-2, B-3 and B-4.

Freight charges covering each of the four shipments were prepaid by West Coast Products Company in the amounts indicated in column 8 under the heading "Amount Collected" of the statement attached hereto and marked Exhibit "A." The said freight charges were computed on the basis of a base rate, plus supplemental increases, dependent upon destination of a shipment, which was provided in Item 3800 of Trans-Continental Freight Bureau East-bound Tariff No. 3-S for commodities described as follows:

> "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

This rate is referred to and commonly known as the "Canned Goods Rate."

Photostatic copies of the Title Page of said tariff together with photostatic copies of pages thereof containing the base rate applicable to the above-quoted tariff provision are attached hereto and marked Exhibit "C."

After transportation of the said shipments was completed and the shipments delivered to consignees at final destination a report was furnished to the office of the Auditor of Freight Accounts of Southern Pacific Company by the Trans-Continental Freight Bureau reading as follows:

"We have report with respect to movement of Olives forwarded by Musco Olive Products Co., Orland, California, that contents in all shipments which they described as 'Black Olives' previously had been entirely cured in brine. The Olives later removed from the brine and allowed to fully dry. At time of putting the Olives in containers for shipment, they were coated with Olive Oil resulting in no other liquid or preservative in the containers except that which drained off the Olives.

"A similar movement of shipments which originated with the West Coast Products Corporation, Orland, California, also obtained and those contents which shippers described as Oil Cured or Oil Coated were likewise Black Olives which had been cured by first placing in a strong brine solution then removed and packed in wet salt for a few days and later placed in the brine solution again. When the salt had penetrated to pits of Olives they were removed from the brine and allowed to fully dry. At the time of placing in shipping containers, Olives were coated with Olive Oil giving them a

glossy appearance and preventing their further drying out. The only liquid in containers was that which drained from the Olives."

Based upon the foregoing report it was concluded that the four shipments of olives did not come within the description of the commodity referred to in Item 3800 of Trans-Continental Freight Bureau Eastbound Tariff No. 3-S quoted herein, as the olives described as "Oil Coated Olives" were not "Canned or preserved in juice or in syrup or liquid other than alcoholic," and it was therefore not proper to apply the rate or rates provided in that tariff item to compute the lawful tariff charges.

It was concluded that the olives in the said shipments described as "Oil Coated Olives" were salt cured olives which were not preserved in any liquid and that it was necessary and proper to apply to such salt cured olives the base rates plus supplemental increases, provided in Item 5670 of Trans-Continental Freight Bureau Eastbound Tariff No. 3-S which are applicable to shipments described as:

"Olives, salt cured, not preserved in liquid, in water proof barrels, boxes, kits or pails."

Photostatic copy of tariff page containing the base rates applicable to the above tariff descriptions is attached hereto and marked Exhibit "D."

Application of such rates resulted in an increase in the lawful tariff charges on each of the four shipments referred to herein to the amounts indicated in Column 7 under the heading "Tariff Charges" in the statement attached hereto and marked Exhibit "A."

As indicated in Column 9 under the heading of "Balance Due" in the statement attached hereto and marked Exhibit "A," the additional freight charges computed in the manner set forth herein total the sum of One Thousand Four Hundred Seventy-five and 51/100 Dollars ($1,475.51) plus federal transportation tax in the sum of Forty-four and 26/100 Dollars ($44.26), a total of One Thousand Five Hundred Nineteen and 77/100 Dollars ($1,519.77).

Demand has been made upon the West Coast Products Co., the shipper of the said shipments for payment of said additional freight charges and federal transportation tax in the sum of One Thousand Five Hundred Nineteen and 77/100 Dollars ($1,519.77), but payment has not been received and the latter sum is now outstanding in the accounts of the Auditor of Freight Accounts of Southern Pacific Company.

/s/ EMMET MURRAY.

Subscribed and sworn to before me this 12th day of March, 1952.

[Seal] /s/ RUTH W. GEORGE,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT A

[Exhibit A attached is identical to Exhibit A attached to the Complaint. See page 7 of this printed record.]

Exhibit B-1

(For Use in Connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classifications, effective March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

7-4 .0M Sets ©

TH. SHIPPING ORDER must be legibly filled in. ...ot be indelible pencil, or to carbon and retained by the Agent.

B-1553
2nd SHEET

SOUTHERN PACIFIC LINES
SOUTHERN PACIFIC COMPANY
PACIFIC MOTOR TRUCKING COMPANY

Shipper's No.
Agent's No. 12

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order.

At ORLAND, Calif., MARCH 8, 194[illegible]

From WEST COAST PRODUCTS CORPORATION, ORLAND, Calif.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract), agrees to carry to its usual place of delivery at said destination. If on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to TRANS-OCEANIC Sales CO., 6 HARRISON STREET, (Name or street address of consignee—For purposes of notification only.)

Destination NEW YORK CITY State of NEW YORK County of

Route SP UP CANE ARM TO HATT & WASHINGTON STREETS, NEW YORK, N.Y.

Delivering Carrier PA Car Initial Car No. 104387

SERVICE DESIRED: Door to Door ( ). Door to Depot ( ). Depot to Door ( ). Depot to Depot ( ).

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subj. to Corr.)	Class or Rate	Check Col.
540	KEGS OLIVES	60,480 lbs.		
	53 kegs STANDARD size			
	80 " MEDIUM "			
	243 " LARGE "			
	100 " EXTRA-LARGE "			
	64 " MAMMOTH "			
	540 kegs			
	DUNNAGE	600 "		
		61,080 lbs.		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per
(The signature here acknowledges only the amount prepaid.)

Charges advanced:
$

Collect On Delivery $ For Account Of And Remit To

Street, City, State

C. O. D. Charge to be Paid By: Consignee ( ). Shipper ( ).

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

WEST COAST PRODUCTS CORPORATION, Shipper.

Per

Permanent postoffice address of shipper P.O. Box 623, Orland, Calif.

2

Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

3-48

©

Exhibit B-2

1-46-1M Use in Connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Western, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1942.) S-1553

THIS SHIPPING ORDER must be legibly filled in, in ink or indelible pencil, or to carbon and retainer by Agent. 2nd SHEET

SOUTHERN PACIFIC LINES

SOUTHERN PACIFIC COMPANY
PACIFIC MOTOR TRUCKING COMPANY

Shipper's No.
Agent's No. SP20

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order.

At Orland, Calif., March 17, 1947

From WEST COAST PRODUCTS CORPORATION, ORLAND, CALIF.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract), agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to TRANS OCEANIC SALES CO., 6 HARRISON STREET, (Mail or street address of consignee—For purposes of notification only.)

Destination NEW YORK CITY State of NEW YORK County of

Route SP - UP - CNW - NYC - LEHIGH To PIER 38 N.Y.

Delivering Carrier Car Initial WAX Car No. 66225

SERVICE DESIRED: Door to Door ( ). Door to Depot ( ). Depot to Door ( ). Depot to Pier ( ).

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subj. to Corr.)	Class or Rate	Check Col.
515	KEGS OLIVES PACKED	57,680 lbs.		
12	BBLS. OLIVES IN BRINE	5,660		
	DUNNAGE	600		
		61,940 lbs.		
		128		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per (The signature here acknowledges only the amount prepaid.)

Charges advanced:

$

Collect On Delivery $ For Account Of And Remit To

Street, City, State

C. O. D. Charge to be Paid By: Consignee ( ). Shipper ( ).

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight.

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

WEST COAST PRODUCTS CORPORATION Shipper.

Per H. Krachon

Permanent postoffice address of shipper P.O. Box 623, Orland, Calif.

E. W. Parker

Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

Exhibit B-3

(In Connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

100M

THIS MEMORANDUM is an acknowledgment that a Bill of Lading has been issued and is not the Original Bill of Lading, nor a duplicate, covering the property named herein, and is intended as a billing or record.

S - 1553
3rd SHEET

SOUTHERN PACIFIC LINES
SOUTHERN PACIFIC COMPANY
PACIFIC MOTOR TRUCKING COMPANY

Shipper's No.
Agent's No. SP-38

Subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading.

[illegible], Calif. APRIL 6, 1949. 194

Received in [illegible] (contents of packages unknown), marked, consigned, and destined as indicated below, which said [illegible] company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract), agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination, it is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

To IMPERIAL FOODS, 2611 EAST 40TH ST., CLEVELAND, OHIO.

CLEVELAND State of OHIO County of

Destination, if on its own road, to U.P., C.M.St.P. to GROCERS TERMINAL WHSE., GRAND AV. TEAM TRACK-516 W. KINZIE ST.,

Carrier CHICAGO, ILL. for partial unloading then N.Y.C. to CLEVELAND, OHIO. Car No. TTOS 94446

ROUTE DESIRED: Door to Door ( ), Door to Depot ( ), Depot to Door ( ), Depot to Door ( ).

DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subj. to Corr.)	Class or Rate	Check Col.
SICILIAN STYLE OLIVES	45,050#		
" " "	8,000#		
OIL CURED OLIVES	11,200#		
OLIVE OIL	2552 #		
DUNNAGE	600#		
Total Weight	67,202#	1/50	
DOOR-OVER CAR AT GROCERS TERMINAL WAREHOUSE			
GRAND AVE. TEAM TRACK-516 W. KINZIE ST., CHICAGO			
FOR PARTIAL UNLOADING.			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID.

Received $
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per
(The signature here acknowledges only the amount prepaid.)

Charges advanced:
$

C.O.D. Delivery $ For Account Of And Remit To

Street, City, State

Charge to be Paid By: Consignee ( ). Shipper ( ).

If moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight.
Note: Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

IMPERIAL FOODS CORP. Shipper, 3 Agent

Per

Per

Final postoffice address of shipper

(This Bill of Lading is to be signed by the shipper or agent of the carrier issuing same.)

Exhibit B-4

(For Use in Connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1930, and June 15, 1941.)

11-47 - 1500M

THIS SHIPPING ORDER must be legibly filled in, in ink, or in carbon and retained by ... fible pencil, or post.

S - 1553
2nd SHEET

SOUTHERN PACIFIC LINES

SOUTHERN PACIFIC COMPANY
PACIFIC MOTOR TRUCKING COMPANY

Shipper's No. ____

Agent's No. SP-39

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order.

At ORLAND, CALIF. APRIL 7, 1949. 194__

From WEST COAST PRODUCTS CORPORATION, ORLAND, CALIF. (the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract), agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination, it is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to MARKET TERMINAL WAREHOUSE, 100 PERRY ST., (Mail or street address of consignee—For purposes of notification only)

Destination BUFFALO State of NEW YORK County of ____

Route SP & UP - CNW - NYC.

Delivering Carrier NYC Car Initial S.P. Car No. 81988

SERVICE DESIRED: Door to Door ( ). Door to Depot ( ). Depot to Door ( ). Depot to Depot ( ).

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subj. to Corr.)	Class or Rate	Check Col.
68 bbls.	SICILIAN STYLE OLIVES	20800#		
190 kegs	" " "	52500#		
108 kegs	OIL CURED OLIVES	12075#		
		65175		
260 Pcs	DUNNAGE	650#	1 50	
		65,825#		
		500		
		65 325		
		32 662 5		
		99.87		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per ____

(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$____

Collect On Delivery $____ For Account Of And Remit To

____ Street, ____ City, ____ State

C. O. D. Charge to be Paid By: Consignee ( ). Shipper ( ).

If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ____ per ____

WEST COAST PRODUCTS CORP. Shipper

Per H. F. Kracher

Permanent postoffice address of shipper P.O. Box 623, Orland, Calif.

2

☞ Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

Exhibit C

SUBJECT TO ITEM X-148 OF SUCCESSIVE ISSUES THEREOF

26

T TO THE PROVISIONS OF TARIFF No. SO-68 (I. C. C. No. A-3391, C. T. C. No. A-891, OF AGENT L. E. KIPP), SUPPLEMENTS THERETO OR SUCCESSIVE ISSUES THEREOF

T. C. No. 814
(Is C. T. C. No. [illegible])

I. C. C. No. 1519
(Cancels I. C. C. No. [illegible]1506)

MF-I. C. C. No. B-42
(Cancels MF-I. C. C. No. [illegible]B-33)

ANS-CONTINENTAL FREIGHT BUREAU

(L. E. KIPP, Agent)

AST-BOUND TARIFF No. 3-S

(Cancels Tariff [illegible]3-R)

[illegible]pt portions under suspension in I. & S. Dockets 5363, 5371 and 5378.

— NAMING —

OCAL, JOINT, EXPORT, IMPORT AND PROPORTIONAL

ALSO JOINT RAIL-MOTOR

COMMODITY RATES

—FROM POINTS IN—

ARIZONA
CALIFORNIA
MEXICO
NEVADA
NEW MEXICO
OREGON
UTAH

(Referred to in Item 54)

—TO POINTS IN—

AMA
NSAS
DA
RADO
ECTICUT
WARE
RICT OF
UMBIA
IDA
GIA
OIS
INDIANA
IOWA
KANSAS
KENTUCKY
LOUISIANA
MAINE
MARYLAND
MASSACHUSETTS
MICHIGAN
MINNESOTA
MISSISSIPPI
MISSOURI
NEBRASKA
NEW HAMPSHIRE
NEW JERSEY
NEW MEXICO
NEW YORK
NORTH CAROLINA
NORTH DAKOTA
OHIO
OKLAHOMA
PENNSYLVANIA
RHODE ISLAND
SOUTH CAROLINA
SOUTH DAKOTA
TENNESSEE
TEXAS
VERMONT
VIRGINIA
WEST VIRGINIA
WISCONSIN
WYOMING

(Referred to in Item 52)

ED BY WESTERN CLASSIFICATION No. 71 (I. C. C. No. 29 AND C. T. C.-W. C. No. 27 OF R. C. FYFE, T), HEREINAFTER REFERRED TO AS WESTERN CLASSIFICATION, AS PROVIDED IN ITEM 600.

ED JANUARY 18, 1946

EFFECTIVE MARCH 1, 1946
Except as otherwise provided herein)

ISSUED BY

L. E. KIPP, Agent, 516 W. Jackson Boulevard, Chicago 6, Ill. (File 6-3-M)

U. S. A.)

(C. P.-40730)

SECTION 2 GENERAL COMMODITY RATES

ITEM No.	ARTICLES IN CARLOADS (Except as otherwise provided)	MIN. C. L. WT. (Pounds)	Rates in Cents per 100 Pounds (Except as noted) TO Points taking the following Group Rates (See Item 52)	FROM Points taking RATE BASIS 1 (See Item 54) L. C. L.	C. L.
75	Calcium Citrate or Citrate of Lime.	40,000 (Subject to Item 706)	A,B,C,C-1,D, E,F,G,H,I	.....	132
			J	.....	124
			K,K-1,L,M	.....	132
		70,000 (Subject to Item 706)	B,C,C-1,D,E, F,G,H,I,J, L,M	.....	88
		100,000 (Subject to Item 706)	A,B,C,C-1,D, E,F,G,H,I, J,K,L,M	.....	77
30	Candle Mounts, flat, wooden, wrapped in bundles.	L. C. L.	C-1	275	
			D,E,F,G,H,I,J	245	
	CANNED GOODS, PICKLES, PRESERVES, and other Articles as designated, viz.:				
	SECTION 1 (Subject to Item 706 and Note 20)		A		(25) 141
	Canned Goods, Pickles, Preserves, as described in and subject to package requirements of Item 125,		B		(25) 116
	(24) Butter, peanut (Peanut Paste), in glass, earthenware or metal cans boxed, in pails or tubs crated, (32) in bulk in barrels, in cartons boxed, or in metal cans completely jacketed,		C	(32) 245	(4) 105
			C-1	245	99
			D,E	215	(25) 99
			F,G,H,I	215	99
	Vinegar, in earthenware or glass packed in boxes,	40,000		175	
	Less carloads or in straight or mixed carloads (except as noted)		J	(32) 150	63
				(32) 125	
	ALSO		K	300	(3) (32) 105
	(a) Mixed carloads (except as noted) of any of the foregoing commodities with any of the following commodities:		K-1		106
	(b) Mixed carloads (except as noted) of any of the following commodities except will not apply on mixed carloads consisting only of two or more commodities included in the same item to which reference is made for description:		L	270	(3) (32) 105
			M	245	105
			A		(25) 102
			B		(25) 96
	Buttermilk, as described in Item 3801, in glass in barrels or boxes; in milk shipping cans; or (32) in bulk in barrels,		C,C-1,D,E		(25) 88
	Cider or Apple Juice, unfermented, other than frozen, as described in Item 4015, in barrels or boxes or in glass in crates,	60,000 (Subject to Note 3)	F,G,H,I		88
			J		77
			K		(4) (36) 88
	Cider Syrup (Boiled Cider), as described in Item 4015, in glass, earthenware or metal cans boxed, in pails or tubs crated, or (32) in bulk in barrels.		K-1		90
			L		(3) (36) 88
			M		88
0	Compounds, flavoring, or Imitation Flavors, N. O. I. B. N., liquid or paste, as described in Item 4160, in containers in barrels or boxes, in metal cans completely jacketed, or in bulk in barrels (Subject to Notes 16 and 17),				
	Feed, animal or poultry, viz.:				
	Meat or Fish, or a mixture containing Meat or Fish, not prepared for human consumption (Subject to Note 10):				
	Other than dehydrated, in hermetically sealed glass or metal containers in barrels or boxes.				
	Dehydrated, in containers, in barrels or boxes,				
	(23) Juice, citrus fruit, as described in Item 4160, in barrels or boxes (Subject to Note 5),				
	(23) Juice, grape (unfermented), other than frozen, in containers in barrels or boxes, or in glass or earthenware in crates with solid tops, or in bulk in barrels,				
	(33) (38) Juice, pineapple (unfermented), other than frozen, in glass, earthenware or metal cans in boxes, in mixed carloads only as provided in Note 7,				
	(30) Juice, prune (unfermented), other than frozen, in barrels or boxes,				
	Labels, paper, N. O. I. B. N., cut or not cut, prepaid, in packages, in mixed carloads only as provided in Note 4,				
	Milk (not malted). Buttermilk (not casein) or Dry Milk Solids, as described in Item 3801 (Subject to Note 18), in containers in bags, barrels, boxes or crates (Subject to Note 19), or in bulk in (32) barrels, boxes, double bags (Subject to Note 1) or multiple-wall paper bags,				
	Oil, cottonseed, refined, in glass, earthenware or metal cans boxed, in pails or tubs crated, or (32) in bulk in barrels,				
	(43) Oil, raisin seed (Grape Seed), refined, in glass, earthenware or metal cans boxed, or (32) in bulk in barrels,				
	Oranges, as described in Item 4160, in metal cans in crates,				
	Pectin, as described in Item 4160, in barrels or boxes or in metal cans in crates,				
	(33) (38) Pineapple, other than frozen, in glass, earthenware or metal cans in boxes, in mixed carloads only as provided in Note 7,				
	Syrup, as described in Item 4160, in metal cans partially or completely jacketed, in containers in barrels or boxes, or in bulk in barrels (Subject to Note 17),				
	Syrup, not medicated, N. O. S., in metal cans completely jacketed Subject to Note 14); in metal cans, other than friction top cans, in crates; in containers in barrels or boxes; or in bulk in barrels or kits (Subject to Note 13),				
	Syrup, raisin, in glass, earthenware or metal cans boxed, or in bulk in barrels,				
	(51) Vinegar, in bulk in barrels.				

(Continued on following page)

N. B.—For Explanation of Abbreviations, see Item 1.

APPLICATION OF RATES

LIST OF ARTICLES TAKING RATES PROVIDED FOR "AGRICULTURAL IMPLEMENT PARTS, OTHER THAN HAND" IN ITEMS MAKING SPECIFIC REFERENCE HERETO

Agricultural Implement Parts, other than hand, classified Class A in Western Classification under heading of "Agricultural Implement Parts, other than hand," in packages as prescribed (also loose when so provided) for such rating in Western Classification, viz.:

Agricultural Implement Parts, other than hand, iron or steel, N. O. I. B. N.,
Agricultural Implement Parts, other than hand, wooden, finished, N. O. I. B. N.,
Agricultural Implement Parts, other than hand, wooden, in the white, N. O. I. B. N.,
Aprons, harvester or reaper,
Attachments, binding, harvester or reaper,
Attachments, fertilizer distributor, for grain or seed drills or planters,
Attachments, sulky,
Band Cutters and Self Feeders combined, for Threshers,
Band Cutters, Self Feeders and Wing Bundle Carriers combined, separator or thresher,
Bars, cutter,
Beams, wooden, finished or in the white,
Blocks (tread), horse power,
Bottoms, plow,
Boxes, harrow ball,
Bunchers, mower,
Carriers (bundle), binder, harvester, reaper, separator or thresher,
Coulters, rolling,
Discs and Drag Bars combined,
Frames, harrow,
Guards, knife with guard plates attached, for Harvesters, Mowers or Reapers,
Guides (plowing), traction engine,
Guides, separator steering,
Handles, wooden, in the white or finished,
Hitches, binder or drill,
Hoists, hay press,
Knives, band, ensilage or feed cutter,
Knives, harvester, mower, reaper, self-feeder or atalk cutter,
Levers, horse power,
Pitmans, binder or mower,
Plates, guard for Harvesters, Mowers or Reapers,
Poles (wooden), finished,
Poles (wooden, in the white), ironed or not ironed,
Poles, separator steering,
Raspa, clover huller,
Rowers, check,
Screens, thresher,
Seats (with or without seat springs), iron or steel, finished,
Sections, knife, for Harvesters, Mowers or Reapers,
Shoes, grain drill,
Sieves, thresher,
Slats, apron, draper, hay sling or reel,
Spikes, clover huller or thresher,
Spools, harrow ball,
Sticks, apron, draper, hay sling or reel,
Sweeps, horse power,
Teeth, clover huller,
Teeth, rake, wooden or iron or steel,
Teeth, thresher,
Trays, harrow weight, iron or steel,
Tubes, grain drill, iron or steel, flexible,
Wheels (other than master [bull], machine finished gear or sprocket):
  Iron or steel,
  Iron or steel and wood combined,
  Wooden,
Wheels, master (Bull Wheels),
Windrowers, mower,
Woods, pitman.

LIST OF ARTICLES TAKING RATES PROVIDED FOR "CANNED GOODS, PICKLES AND PRESERVES" IN ITEMS MAKING SPECIFIC REFERENCE HERETO

CANNED GOODS, PICKLES, PRESERVES, in glass, earthenware or metal cans boxed, in pails or tubs crated, or in bulk in barrels, except as otherwise provided (Subject to Note 1), viz.:

Bread, brown, in metal cans in boxes,
Bread, date-nut, in metal cans in boxes,
Brine, sauerkraut, other than frozen, in barrels, boxes or kits,
(X) Caviar, cooked, pickled or preserved, in glass, earthenware or metal cans boxed,
Chili Peppers, ground, including Chili Powder, in boxes,
Cocoanut, prepared, in boxes, or in metal cans in crates,
Cream or Milk, sterilized (not requiring refrigerated protection), in hermetically sealed containers in boxes,
Fish N. O. S., including Shell Fish, cooked, pickled or preserved, with or without cereal, fruit or vegetable ingredients, in glass, earthenware or metal cans boxed (Subject to Note 2),
(X) Fish Roe (other than Canned Salmon Eggs prepared for fish bait), cooked, pickled or preserved, in glass, earthenware or metal cans boxed,
Fruit (other than dried, evaporated or fresh), N. O. S., canned or preserved in juice or in syrup or liquid other than alcoholic; Fruit Butter, Crushed or Drained Fruit, Fruit Jam, Fruit Jelly or Fruit Pulp (not dried fruit, ground or crushed), in packages named, or in kits, pails or tubs (Subject to Note 6),
Jam, glucose, in packages named, in metal cans crated, or in kits, pails or tubs,
Jelly, corn syrup, in packages named, in metal cans crated, or in kits, pails or tubs,
Juice, clam, in glass, earthenware or metal cans boxed,
(R) Juice, fruit (unfermented), artificial or natural, N. O. I. B. N., other than frozen, in glass or earthenware in boxes, or in carboys, or in metal cans or pails in crates, or in bulk in barrels,
(R) Juice, pineapple (unfermented), other than frozen, in glass, earthenware or metal cans in boxes, or in bulk in barrels,
Juice, sauerkraut, other than frozen, in barrels, boxes or kits,
Juice, tomato, other than frozen, in barrels or boxes, or in glass, earthenware or metal cans in crates,
Juice, vegetable, N. O. S., other than frozen, in barrels or boxes, or in glass, earthenware or metal cans in crates,
Leaves, grape, pickled in brine, in barrels,
Macaroni, (X) Noodles, Spaghetti or Vermicelli, prepared, with or without cheese, meat or vegetables, in glass, earthenware or metal cans boxed,
Meats N. O. S., including Sausage, cooked, cured or preserved, with or without cereal or vegetable ingredients, in glass, earthenware or metal cans boxed, or in metal cans in crates (Subject to Note 2),
Milk (condensed or evaporated), liquid or paste, in metal cans completely jacketed or in crates, or in containers in barrels or boxes, or in bulk in barrels (Subject to Note 5),
(X) Milk Food (other than malted milk), liquid, in barrels, or in metal cans in cartons in crates,
Mince Meat, in packages named, in cartons boxed, or in kits, pails or tubs,
(X) Molasses N. O. I. B. N.,
Mushrooms, preserved in liquid,
Oil, corn, refined,
Olives, canned or preserved in juice or in syrup or liquid other than alcoholic,
Paste, tomato, in packages named, or in cans crated,
(X) Pectin, fruit or vegetable, N. O. S., in packages named, or in metal cans crated,

(Concluded on following page)

Issued from Supplement No. 65 to I. C. C. No. 1506 of Agent L. E. Kipp, effective February 1, 1946.
M. —For Explanation of Abbreviations, see Item 1

(X) Oil, olive,
(X) Olive Oil Foots, Residuum or Sediment,

EXCEPTIONS TO WESTERN CLASSIFICATION GOVERNING TARIFF

em
o.

ARTICLES

STRAIGHT OR MIXED CARLOADS (Subject to Note 1)

(a) **STRAIGHT CARLOADS:**
(1) Carload rates named in this tariff apply on straight carloads of articles named unless otherwise specifically provided in individual rate items.
(2) When a portion of a straight carload shipment of an article is in package or loose or in bulk other than as specified in the item in which the rate is named and is subject to provisions of Item 615, the higher rate as provided in Item 615 will be applied only on the actual weight of that portion of the shipment which does not conform with provisions of governing rate item.

(b) **MIXED CARLOADS** (Subject to Note 2).—Carload rates named in this tariff apply on mixed carloads under the following conditions only, viz.:
(1) Of two or more articles named in one item not containing alternating sections.
(2) Of two or more articles named in the same section of an item containing alternating sections.
(3) As otherwise specifically provided in individual rate items.

(c) Charges on mixed carload shipments for which mixed carload rates are provided will be determined by either of the following formulas, whichever results in the lower per car charge, viz.:
(1) Actual or authorized estimated weight for the entire shipment at authorized mixed carload rate subject to the minimum weight published in connection therewith; or—
(2) Actual or authorized estimated weight for one or more of the articles at authorized carload rate subject to minimum weight published in connection therewith, plus less than carload rate or rates at actual or authorized estimated weight for the other articles.

(d) When an item of this tariff provides rates for mixed carloads only, the rates apply unless otherwise provided on mixed carloads of any two or more of the articles named.

(e) Rule 10 of Western Classification does not apply.

Note 1.—The provisions of this item do not modify the provisions of Rule 15 of Western Classification on Premium shipments.

Note 2.—When there is included in a mixed carload shipment an article or articles in package or loose or in bulk other than as specified in the item in which the rate is named and which are subject to higher rate under the provisions of Item 615, the rate to be used in determining the "highest rate" on the article or articles subject to Item 615 will be the rate applicable on the article when shipped as specified in the item which names the rate. Charges on the article or articles not conforming to that specified in the governing rate item will be based on the provisions of Item 615, applied to the rate applicable to the mixed carload, at actual weight of such article or articles.

Household Goods, as described in Western Classification under head of "Household Goods," in less than carload lots, charges must be prepaid or guaranteed.

ADVANCEMENT OF FREIGHT CHARGES

Exception to Rule 8 of Western Classification. Advancing Charges.

No charges of any description will be advanced to shippers, owners, consignees or agents thereof, nor to their draymen or warehousemen, except where tariff of carrier at point of origin or transit point provides for the advancing of such charges.

ARTICLES TOO LONG OR BULKY TO BE LOADED THROUGH SIDE DOOR WITHOUT USE OF END DOOR OR WINDOW IN CLOSED CAR

(*The provisions of this item do not apply to points taking Group K, K-1, L or M rates nor to points in Eastern Canada; Group A, B and C rates are subject to Item 185.*)

The provisions of Section 3, Rule 23 of Western Classification do not apply in connection with traffic moving from and to points named in this tariff.

(*The provisions of this item do not apply to points taking Group A rates—[See Item 40].*)

(a) **Meat Hooks** (not to exceed 700 in number per car) and **Racks** used in the transportation of **Fresh Meat, Fresh Fish, Packing House Products** as described in Item 1135 of Perishable Protective Tariff No. 13 (I. C. C. No. 22 of Agent J. J. Quinn), Butter, Butterine, Oleomargarine, **Eggs, Cheese** and Dressed Poultry in a refrigerator car, will be treated as part of such refrigerator car equipment and are transported without charge while in car on both loaded and empty movement.

When a carrier removes any or all of the above equipment for its own convenience it will return same to owner free of transportation charges.

(b) **Refrigerator barrels, refrigerator boxes, meat crates, galvanized iron pans, galvanized iron tanks, ice cones, meat sticks, stilts and trays** used as containers for or to protect shipments of meat or fresh fish; and meat hooks in excess of the amount necessary to equip a car (700 in number) will be returned to owner at fourth class rates, when returned in refrigerator cars or when removed by carrier for its convenience and returned by local freight. Carriers should show on billing and expense bill reference to car number from which accessories (Sec. b) were removed, naming the point at which they were removed.

When the above accessories (Sec. b) are returned in car, shipment is not subject to trap car rules published by carriers lawfully on file with the Interstate Commerce Commission.

REISSUED from Supplement No. 65 to I. C. C. No. 1506 of Agent L. E. Kipp, effective February 1, 1946.
N. B.—For Explanation of Abbreviations, see Item 1.

SECTION 2—GENERAL COMMODITY RATES

ARTICLES IN CARLOADS (Except as otherwise provided)	MIN. C. L. WT. (Pounds)	Rates in Cents per 100 Pounds (Except as noted) TO Points taking the following Group Rates (See Item 52)	FROM Points taking RATE BASIS 1 (See Item 54) L. C. L.	C. L.
Olives, salt cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails.		A,B	248	165
		C	245	165
		C-1	245	165
Less carloads or in straight carloads	30,000 (Subject to Item 706)	D,E,F,G,H,I	(22)215	(22)165
			(21)175	
ALSO		J	(22)150	
			(23)125	
Mixed carloads of the foregoing commodity with one or more of the following commodities:		K,L	248	165
		M	245	165
Oil, olive, in glass, earthenware or metal cans boxed, or in bulk in barrels,	60,000 (Subject to Item 706)	C		(23)138
Olive Oil Foots, Residuum or Sediment, in glass, earthenware or metal cans boxed, or in bulk in barrels,		C-1,D,E,F,G, H,I		138
Olives, canned or preserved in juice or in syrup or liquid other than Alcoholic.				

Note.—The lowest charge applicable under any scale of rates, based on actual weight of shipment, but not less than the minimum weight specified in connection with the rate used, must be applied.
(21)In lots of less than 5,000 lbs. (Subject to Note).
(22)In lots of 5,000 lbs. and less than 10,000 lbs. (Subject to Note).
(23)In lots of 10,000 lbs. and over (Subject to Note).
(28)Rates apply also to Group 22 points (See Item 52).

ONYX, viz.:				
Blocks, Pieces or Slabs, N. O. S., polished or traced, in boxes or crates.	L. C. L.	D,E,F,G,H,I	275	
		J	248	
Orange Meal (edible), dried, flaked, in bags	40,000 (Subject to Item 706)	A, B, C, C-1, D,E,F,G,H, I		131
		J		110
		K,K-1,L,M		131
	60,000 (Subject to Item 706)	A, B, C, C-1, D,E,F,G,H, I		121
		J		100
		K,K-1,L,M		121
Ore, actual value exceeding $300.00 per ton of 2,000 lbs. (Subject to Notes 1 and 2 and Item 746).				
Note 1.—Shipments are entitled to sampling in transit privileges as authorized in tariffs of individual lines, parties hereto, and lawfully on file with the Interstate Commerce Commission.	40,000	A,B,C,C-1,D, E,F,G,H,I		289
		J		255
Note 2.—Rates in connection with Southern S. S. Co. apply only on shipments in sacks (See Item 177).		K,K-1,L,M		289
Ore, actual value not exceeding $300.00 per ton of 2,000 pounds (Subject to Notes 1 and 2 and Item 746).				
Note 1.—Shipments are entitled to sampling in transit privileges as authorized in tariffs of individual lines, parties hereto, and lawfully on file with the Interstate Commerce Commission.	40,000	A,B,C,C-1		256
		D,E,F,G,H,I		240
		J		210
Note 2.—Rates in connection with Southern S. S. Co. apply only on shipments in sacks (See Item 177).		K,K-1,L,M		256
Ore, actual value not exceeding $100.00 per ton of 2,000 pounds (Subject to Notes 1 and 2 and Item 746).				
Note 1.—Shipments are entitled to sampling in transit privileges as authorized in tariffs of individual lines, parties hereto, and lawfully on file with the Interstate Commerce Commission.	40,000	D,E		141
		F,G,H,I		(21)141
Note 2.—Rates in connection with Southern S. S. Co. apply only on shipments in sacks (See Item 177).		J		(21)117
(28)Rates do not apply from points on SP in Arizona or New Mexico.				

Rates are subject to Item 185.
N. B.—For Explanation of Abbreviations, see Item 1.

[Title of District Court and Cause.]

AFFIDAVIT OF E. J. SWANSON

State of California,
City and County of San Francisco—ss.

E. J. Swanson being duly sworn deposes and says:

I am a citizen of the United States and of the State of California residing in Alameda County, California. My office headquarters are 717 Market Street, San Francisco.

I have been employed by Trans-Continental Freight Bureau in various capacities for more than 15 years. My present position is Bureau Chief Traveling Inspector and I have been employed in that capacity for the past 4 years. My duties in the said employment for Trans-Continental Freight Bureau include Supervision of field forces, investigating claims and making of inspections and investigations for the purpose of determining the correct description of various shipments of freight transported by rail carriers from and to various points in California.

In the course of my duties as Bureau Chief Traveling Inspector I was requested during the early part of 1949 to make an investigation at Orland, California with respect to various shipments of olives which had been and were being transported by rail carriers from that point to various destinations in the eastern part of the United States. In

response to this request, on or about the 22nd day of April, 1949, I called at the plants of Musco Olive Products Company and West Coast Products Co., at Orland, California.

In my investigation at the plant of the Musco Olive Products Company I developed that olives which has been and were being shipped during 1948 and 1949 under the description of "Black Olives" were processed or cured by placing them in a heavy brine solution where they remained until at or about the time the curing process was completed; after such process the olives are removed from the brine solution and coated with olive oil, after which they are placed in kegs or barrels for shipment. There is no liquid in the kegs or barrels except the olive oil and brine solution which may drain from the olives.

At the plant of the West Coast Products Co., I developed that black olives had been and were being shipped during 1948 and 1949 under the description "Oil Coated Olives" and that such olives were processed or cured by placing them alternately in strong brine solution and wet salt pack until at or about the time the curing process was completed. Thereafter the olives are removed from the brine solution or wet salt pack and allowed to fully dry. At the time of packing the olives in kegs or barrels they are coated with olive oil which gives the fruit a glossy appearance.

The only difference in the processing method used by Musco Olive Products Co. and West Coast

Products Co., is that the former uses a brine solution for curing olives whereas the West Coast Products Co., uses brine solution and wet salt pack alternately for curing olives. The end result of the two processing methods is identical.

/s/ E. J. SWANSON.

Subscribed and sworn to before me this 12th day of March, 1952.

[Seal] /s/ RUTH W. GEORGE

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed March 12, 1952.

In the District Court of the United States in and for the Northern District of California, Southern Division

No. 29726—Civil

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff,

vs.

WEST COAST PRODUCTS CORP., a Corporation,

Defendant.

AFFIDAVIT OF AMADEO PAONI IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of California,
County of Glenn—ss.

Amadeo Paoni, being first duly sworn, deposes and says:

That during the years 1948 and 1949 and for some years prior thereto and ever since he has been, and now is, the Vice President and Manager in Charge of Production of West Coast Products Corporation, the defendant in the above-entitled.

That he was personally in charge of the curing, processing, packing and shipping of all of the olives which were shipped from Orland, California, on the

respective dates and in the cars following, to wit:

Mar. 8, 1948 .....Penn 104387
Mar. 17, 1948 .....Wab 86233
Apr. 6, 1949 .....TNO 59444
Apr. 7, 1949 .....SP 81989

That the four cars hereinbefore set forth are the four cars covered by the above-entitled action and are the cars upon which the plaintiff above-named seeks to obtain additional tariff charges from the defendant above-named.

That all of the olives shipped in all of said cars were preserved in juice or liquid other than alcoholic and that none of said olives were salt cured, not preserved in liquid.

That all of the olives referred to in the various bills of lading issued by the plaintiff upon the shipments hereinbefore mentioned referred to as oil-coated olives or as oil cured olives were processed under the supervision of affiant; that all of said olives were processed in the ripe state; that in the first part of the process used by affiant upon said olives some salt was used but thereafter affiant caused all of said salt to be thoroughly washed from the olives and when the olives were finally cured there was no salt therein; that in completing the processing of said olives they were cured with and packed in olive oil and when shipped they were packed in 100 pound kegs; that said kegs contained no salt whatsoever and did contain olive oil

and said olives were preserved in olive oil and in their own juice and in liquid other than alcoholic.

Affiant avers that it is not true that the black olives so shipped as oil cured or oil coated were placed in a strong brine solution or were packed in wet salt for a few days or were later or at all placed in the brine solution again; that it is not true that when the salt had penetrated to the pits of the olives they were removed from the brine and allowed to fully dry or that the salt had ever penetrated to the pits of the olives; that it is true that the olives so shipped by the defendant were coated with olive oil and that it did give them a glossy appearance but that so doing was not for the purpose of preventing them from further drying out but said olive oil was placed in the kegs with said olives for the purpose of preserving them, and that it is not true that the only liquid in the containers was that which drained from the olives but in addition thereto there was the olive oil placed therein by employees of said defendant under the supervision of affiant in the processing and shipping of said olives and that thereby the said olives were preserved in juice or liquid other than alcoholic.

That it is not true that the olives in the said shipments described as oil coated olives or oil cured olives were salt cured olives which were not preserved in any liquid and that it was not necessary or proper to apply to said olives the base rates for salt cured olives, not preserved in liquid, as provided in Item 5670 of Trans-Continental Freight

Bureau Eastbound Tariff No. 3-S but on the contrary the base rate applicable thereto was that referred to in Item No. 3800 of said Tariff.

That it is not true that the said olives so shipped by said defendant were processed or cured by placing them alternately in strong brine solution or wet salt pack until at or about the time the curing process was completed, and that it is not true that the olives were thereafter removed from the brine solution or wet salt pack and allowed to fully dry, but in that behalf affiant avers that when the said olives were removed from the salt all of the salt was fully removed therefrom and said olives were never placed in a brine solution. That it is true that at the time of packing the olives they were coated with olive oil but in addition thereto they were shipped in olive oil and there was no coating given for the purpose of giving the fruit a glossy appearance.

That the olives refered to in the said bills of lading covering said shipments as olives in brine or as Sicilian Style olives were processed and shipped under the supervision of affiant; that said olives were processed in the green state in brine and were shipped in brine, packed in kegs of 100 pounds each and in barrels of 165 pounds each; that all of said olives so shipped by said defendant in the various shipments hereinbefore mentioned were preserved in juice or liquid other than alcoholic.

That all of the olives so shipped in all of said four shipments were all processed, packed and

shipped under the supervision of affiant and that that all of the same were olives provided for in Item 3800 of said tariff and none of the same were olives referred to in Item 5670 of said tariff.

/s/ AMADEO PAONI.

Subscribed and sworn to before me this 20th day of June, 1952.

[Seal] /s/ H. W. HOSKING,
Notary Public in and for the County of Glenn, State of California.

[Endorsed]: Filed June 24, 1952.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. DAVIS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of California,
City and County of San Francisco—ss.

Robert E. Davis, being first duly sworn, deposes and says:

That he is a traffic consultant; that he has been engaged in said profession for the period of twelve (12) years and prior thereto was employed by railroad companies in the examination and fixing of tariffs and freight rates.

That he has examined four freight bills covering shipments made by West Coast Products Corpora-

tion, the defendant in the above-entitled action, over the railroad of Southern Pacific Company and covering shipments made on the dates and in the cars following:

Mar. 8, 1948 .....Penn 104387
Mar. 17, 1948 .....Wab 86233
Apr. 6, 1949 .....TNO 59444
Apr. 7, 1949 .....SP 81989

That with reference to Car TNO 59444 the calculations whereby said Southern Pacific Company claims a balance of $342.45 are incorrect; that even upon the assumption that Item 5670 of the tariff in question is applicable to the olives described as oil cured olives in the bill of lading covering said car there were but 11,200 pounds of this type of olives in said car. Under Rule 10, Section 3, of the Consolidated Freight Classification the carrier must use the less carload shipment rate on a quantity contained in the carload if that basis costs less than using the carload as a whole. Therefore, using the less carload rate of $3.80 in accordance with Item 5670 on said quantity of olives the freight charge would amount to $425.60. The remainder of 55,602 pounds of Sicilian type olives in said car, which undisputably come under Item 3800, at the rate of $1.50 on a minimum weight of 60,000 pounds amounts to $900.00, and adding these two items together, even if Item 5670 of the tariff is used as to the oil cured olives, would make a total of $1325.60, plus 5% surcharge, or $1391.88, instead of

$1561.82 attempted to be charged by the plaintiff above named.

That with reference to Car SP 81989 the said car covered 53,100 pounds of Sicilian type olives, which are unquestionably chargeable under Item 3800, and 12,075 pounds of oil cured olives. Based upon the same calculation hereinbefore set out the correct balance claimed by the said plaintiff should be the sum of $409.87. In this regard affiant calls attention to the fact that in the calculation of its freight bill the said plaintiff has committed an error in addition and that using the figures upon which the plaintiff bases its claim the difference in its billing should be $515.98 instead of $412.99, but affiant further avers that neither of said amounts is correct and that even under Item 5670 the correct balance would be $409.87 on the oil cured olives.

/s/ ROBERT E. DAVIS.

Subscribed and sworn to before me this 18th day of June, 1952.

[Seal] /s/ CHALMER MUNDAY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 24, 1952.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 25th day of August, in the year of our Lord one thousand nine hundred and fifty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

MINUTES OF AUGUST 25, 1952

This case came on for hearing on motion for summary judgment.

After argument by respective counsel, it is ordered that said motion for summary judgment be denied.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

The plaintiff, Southern Pacific Company, requests the defendant, West Coast Products Corp., within 10 days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial.

That each of the following statements is true:

1(a). That on or about March 8, 1948, at Orland, California, defendant tendered to plaintiff car PA

104387 containing olives for shipment to New York, New York.

1(b). That Exhibit A attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 1(a).

1(c). That the document described in paragraph 1(b) was signed in behalf of defendant by H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of defendant.

1(d). That the facts stated in the said Exhibit A are correct.

1(e). That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit A.

2(a). That on or about March 17, 1947, at Orland, California, defendant tendered to plaintiff car Wabash 86233 containing olives for shipment to New York, New York.

2(b). That Exhibit B attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 2(a).

2(c). That the document described in paragraph 2(b) was signed in behalf of the defendant by H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of the defendant.

2(d). That the facts stated in the said Exhibit B are correct.

2(e). That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit B.

3(a). That on or about April 6, 1949, at Orland, California, defendant tendered to plaintiff car T&NO 59444 containing olives for shipment to Cleveland, Ohio.

3(b). That Exhibit C attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 3(a).

3(c). That the document described in paragraph 3(b) was signed by A. P. Paoni per S.A.K.; that the said party who signed the said document was at said time of signing a duly authorized representative of the defendant.

3(d). That the facts stated in the said Exhibit C are correct.

3(e). That the plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit C.

4(a). That on or about April 7, 1949, at Orland, California, defendant tendered to plaintiff car SP 81989 containing olives for shipment to Buffalo, New York.

4(b). That Exhibit D attached hereto is a correct copy of the shipping order copy of the bill of

lading covering the shipment described in paragraph 4(a).

4(c). That the document described in paragraph 4(b) was signed in behalf of the defendant H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of the defendant.

4(d). That the facts stated in the said Exhibit D are correct.

4(e). That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit D.

5(a). That the amount of freight charges collected by plaintiff for transportation of shipment in car PA 104387 was $938.18 including tax.

5(b). That the amount of freight charges collected by plaintiff for transportation of shipment in car Wabash 86233 was $943.72 including tax.

5(c). That the amount of freight charges collected by plaintiff for transportation of shipment in car T&NO 59444 was $1,061.37 including tax.

5(d). That the amount of freight charges collected by plaintiff for transportation of shipment in car SP 81989 was $1,028.86 including tax.

6. That the freight charges referred to in paragraphs 5(a), 5(b), 5(c) and 5(d) were assessed and computed on the basis of a rate provided in Item 3800 of Trans-Continental Freight Bureau East-

bound Tariff No. 3-S for commodities described as:

"Olives, canned or preserved in juice, or in syrup or liquid other than alcoholic."

7. That Item 5670 of Trans-Continental Freight Bureau Eastbound Tariff No. 3-S provides freight rate which is applicable to shipments moving from Orland, California, to eastern destination described as:

"Olives, salt cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails."

8(a). That freight charges on the shipment in car PA 104387, covered by shipping document identified as Exhibit A, computed on the basis of the rate referred to in Paragraph 7 herein, are the sum of $1,304.66.

8(b). That freight charges on the shipment in car Wabash 86233, covered by shipping document identified as Exhibit B, computed on the basis of the rate referred to in Paragraph 7 herein, are the sum of $1,312.36.

8(c). That freight charges on the shipment in car T&NO 59444, covered by shipping document identified as Exhibit C, are in the sum of $1,403.82, and in computing the said sum the rate referred to in Paragraph 7 herein was applied to the 100 kegs of oil cured olives in said car.

8(d). That freight charges on the shipment in car SP 81989, covered by shipping document identified as Exhibit D, are in the sum of $1,426.80, and

in computing the said sum the rate referred to in Paragraph 7 herein was applied to the 105 kegs of oil cured olives in said car.

9. That if the freight charges as computed in 8(a), (b), (c) and (d) above apply to the movement of said four freight cars, then the defendant owes to the plaintiff the sum of $1,475.51 for freight charges and $44.26 Federal tax on said sum of freight charges.

Dated: March ...., 1953.

.....
A. T. SUTER,

.....
FREDERICK E. FUHRMAN,

Attorneys for Plaintiff.

EXHIBITS A, B, C, D

[Exhibits A, B, C, D, attached to the foregoing Request for Admissions are identical to Exhibits B-1, B-2, B-3 and B-4 attached to Plaintiff's Notice of Motion for Summary Judgment. See pages 22 to 25 of this printed record.]

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1953.

[Title of District Court and Cause.]

ADMISSIONS

Defendant, in response to the request of the plaintiff above named upon said defendant to make certain admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial states as follows;

Admits all the statements numbered 1(a) to and including 6.

Admits statements 7, 8(a), 8(b), 8(c), 8(d) and 9, with the qualification that said defendant does not admit that Item 5670 of Trans-Continental Freight Bureau Eastbound Tariff No. 3-S is applicable to the olives in question, but contends that Item 3800 thereof is applicable, and denies that any amount whatsoever is due by the defendant to the plaintiff.

Dated: April 23, 1953.

/s/ ALBERT PICARD,
Attorney for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 28, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION TO SET ASIDE SUBMISSION AND REOPEN TRIAL

To the plaintiff above named and to Messrs. A. T. Suter and Frederick E. Fuhrman, its attorneys:

You Will Please Take Notice that on Friday, the 5th day of June, 1953, at the hour of 9:30 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, at the courtroom of Hon. Louis Goodman, one of the judges of the above-entitled court, Room 258 of the United States Post Office and Court House Building, at Mission and Seventh Streets, San Francisco, California, the defendant above named will move the above-entitled court for an order setting aside the submission of the above-entitled action, reopening the trial thereof to permit further testimony to be taken, and setting a date for the hearing of said further testimony.

Said motion will be made upon the grounds that since the submission of the above-entitled action the defendant has discovered evidence of an important nature bearing upon the interpretation to be given to the tariffs upon the basis on which the above-entitled action is to be determined by the above-entitled court covering the use of olive oil for the preserving of olives and showing that the charge for olives coated with olive oil for preserving should come within the lower tariff and that the plaintiff should not be entitled to recover judgment against

said defendant; that the said interpretation is indicated by letters written by the plaintiff above named to various persons on the 9th day of April, 1953, and the 11th day of May, 1953, copies of which said letters are annexed hereto and made a portion hereof, and that the defendant above-named is entitled to subpoena persons employed by said plaintiff as its witnesses and to cause said persons to produce the originals of letters from Trans-Continental Freight Bureau upon said interpretation of said type of olives are based and to furnish further testimony to support the case of the defendant herein.

Said motion will be based upon this notice, upon all the files and pleadings in the above-entitled action, upon the testimony heretofore taken and the arguments heretofore had before the above-entitled court, and upon such evidence, oral and documentary, as may be adduced at the hearing hereof.

Dated: May 25, 1953.

/s/ ALBERT PICARD,
Attorney for Defendant.

EXHIBIT A

Southern Pacific Company
65 Market Street
San Francisco, California

April 9, 1953.

File 2-TC-810-1.

Mr. C. J. Reidy, ATM,
California Packing Corporation,
215 Fremont St.,
San Francisco 19, Calif.

Mr. Ruland Hardy,
Golden State Olive Co.,
P. O. Box 287,
Corning, Calif.

Mr. J. P. Ventre, TM,
Howard Terminal,
P. O. Box 857,
Oakland, Calif.

Subject: Olives, Salt Cured, Coated with Olive Oil for Preserving, CL-EB-Apn. D-9598.

Gentlemen:

Refers to Mr. Riedy's file 40-1 of February 17, Mr. Hardy's letter of January 6, and Mr. Ventre's letter of March 23 on the above subject:

On April 6, for approval or disapproval not later than April 21, 1953, the Standing Rate Committee of the Trans-Continental Freight Bureau issued the following recommendation on Trans-Continental

Freight Bureau Application D-9598 and Supplement 1 thereto:

"(1) That the application as presented be declined.

"(2) Amend Item 5670-series, Tariff 2-s, as follows:

(a) Eliminate rates subject to Min. C. L. wt. of 60,000 lbs.

(b) Subject entry covering 'Olives, salt cured, not preserved in liquid, etc.' to a note reading:

Note—Rates also apply on salt cured olives which are coated with olive oil as a preservative, in barrels or kegs.

(c) Designate present publication as 'Section 1.'

(d) Add Section 2 with commodity description reading:

Olives, salt cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails (subject to Note (X). Less carloads or in straight carloads

Also

Mixed carloads of the foregoing commodity with one or more of the following commodities:

Canned or preserved foodstuffs as described in Item 3800 (subject to Note xx)

and subject to Min. C. L. wt. of 60,000 lbs., from Rate Basis 1 or 4 points to Groups A, B, C, C-1,

C-2, C-3, C-4, D, D-1, D-2, D-3, D-4, E, E-1, E-2, E-3, E-4 E-5 E-6, F, F-1, G, H, I, K, K-1, K-2, L, L-1, M, M-1 and N, at rate of 200 cents per 100 lbs. (Subject to Tariff X-175-Series.)

Note (X) as explained in sub-paragraph (b) above.

Note xx.—(The provisions of sub-paragraph (c) of paragraph (2) of Item 31 do not apply in connection with this Note.) Articles made subject to this Note are subject to the following conditions:

(a) Charges on the canned or preserved foodstuffs shall be based on actual weight at the following rates:

Rates in cents per 100 lbs. to points shown in group:

A	B	C, C-1, C-2, C-3, D, D-4, E, E-6, M, M-1
174	164	150

C-4, D-1, D-2, E-1, E-3, E-4,	D-3, E-2, E-5, F, G, H, I, N
143	147 143

K, K-2, L, L-1	K-1
	154

(b) The weight of the articles made subject to this Note may be used to make up the min. C. L. wt. prescribed in this item.

(c) When the weight of a mixed carload does not equal the min. C. L. wt. prescribed in this Item, the weight necessary to make up the prescribed min. C. L. wt. is charged on basis of the highest rated article in the car.

(Rates are subject to Tariff X-175-B)

(3) No rate advice to be issued until Eastern Railroads concur."

Reasons in support of this recommendation are as follows:

"This application, as amended, is for a reduction in the eastbound carload rates on salt-cured olives coated with olive oil for preserving, in barrels or kegs, to the level of the canned goods rates in Item 3800-series of Tariff 2-S, which rates presently apply on olives, canned or preserved in juice or in syrup or liquid other than alcoholic, in containers as specified in Item 125.

"The present rates on salt cured olives, not preserved in liquid, in Item 5670 are represented to be entirely too high to move this tonnage by rail, with the result that it is moving via water to territory close to the Atlantic Seaboard and by truck to interior territory.

"Item 5670 carries two scales of carload rates, subject to minimum carload weights of 30,000 lbs. and 60,000 lbs. However, there are no rates at 60,000 lbs. to the Southeast nor to Groups A or B.

"The potential tonnage of olives of the character here involved, which original in the northern Sacramento Valley in California, is estimated at some 15 to 20 carloads per season which runs from December through May. Some of the movement contemplated would be in mixed carloads with canned goods and the fact that such mixture is not permitted on basis of the canned goods rates has re-

sulted in inability of the rail lines to secure any of the business.

"Eastbound Intercoastal Tariff 2-C (Item 210) includes olives, unqualified, in barrels, kits, pails or other packages named, in the canned foodstuffs list at carload rate of $1.37 ($1.19 plus 15%) minimum weight 20,000 pounds, although the rate in Item 490 on olives, salt-cured, in parchment-lined waterproof boxes, at the same minimum, is $1.50 ($1.30 plus 15%).

"We are reliably informed that the $1.37 rate is being applied on the olives involved in this application, a good portion of which moves to the New York area. To this is added an average trucking charge of 25 cents from Orland or Corning, Calif., to the port, 2½ cents wharfage, 10 cents segregation charge, and an average 25 cent trucking charge from dock to New York, total approximately $1.99½ plus marine insurance.

"Shippers have indicated that for the rail lines to secure this movement it will be necessary to provide a rate which will be no higher than the cost of water or truck shipments.

"The canned goods rate to Group A at 60,000 lbs. minimum is $1.74 plus 12 cents under Tariff X-175-B, equal to $1.86 per 100 lbs. At the 40,000 lb. minimum the Group A rate is $2.40 plus 12 cents, equal to $2.52.

"While olives packed in this manner cannot be loaded as heavy as those packed in brine we are advised that there is not difficulty in loading to the

minimum weights prescribed for canned goods, and we believe that no change should be made in the present rates in Item 5670 at 30,000 lbs.

"However, we think that some reduction in the carload rates at 60,000 pounds is warranted in order to secure some of this tonnage but we do not believe that the competitive situation justifies rates as low as on canned goods.

"Our best judgment is that a rate of $2.00 (subject to Tariff X-175-series) equivalent to $2.12, to Groups A, K and west, at 60,000 lbs. minimum, with provision for mixing with canned goods at the rate on each, should be adequate and we so recommend."

We have not as yet completed our study of this recommendation but are passing it along promptly as information. Any comments you may care to make will be appreciated.

Yours truly,

/s/ H. W. KLEIN.

cc—Mr. P. P. Dougherty, FTM, SP Co., San Francisco, Calif.
Mr. W. G. Barr, DFA, SP Co., San Francisco, Calif.
Mr. O. V. Gibson, DFA, SP Co., Sacramento, Calif.
(File A-1450-Olives, 2/13/53)
Mr. C. H. Reeves, DFA, SP Co., Oakland, Calif.
Mr. C. E. Ward, DFA, SP Co., Fresno, Calif.
(File B-1330-Olives, 2/19/53)

Southern Pacific Company
65 Market Street
San Francisco, California

At Chicago, May 11, 1953.

File: TC-810-1.

Mr. Ruland Hardy, Manager,
Golden State Olive Company,
P. O. Box 287,
Corning, California.

Subject: Salt Cured Olives, Coated with Olive Oil for Preserving, CL, EB. (TCFB Application D-9598)

Dear Sir:

Referring to your letter of April 15th on the above subject:

Am pleased to inform you that at meeting in Chicago today the Freight Traffic Manager's Committee of Trans-Continental Freight Bureau disapproved the Standing Rate Committee's recommendation of April 6th and in lieu thereof approved the following changes:

1. Cancel rates except as to LCL rates to Groups A, B and C in Item 5670, Tariff 2-S, and amend Item 125, Tariff 2-S, eliminating in connection with entry on olives the words "in juice or in syrup or in liquid other than alcoholic."

In effect, the above action will permit shipments of salt cured olives in straight carloads or in mixed

carloads with canned goods at the rates no in effect on canned foodstuffs generally.

Yours truly,

/s/ E. J. LARSON.

cc: Mr. P. P. Dougherty, FTM, SP Co., San Francisco, Calif.
Mr. O. V. Gibson, DFA, SP Co., Sacramento, Calif.
(File A-14-50, Olives, Feb. 13, 1953.)

Receipt of copy acknowledged.

[Endorsed]: Filed May 26, 1953.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the court room thereof, in the City and County of San Francisco, on Friday, the 5th day of June, in the year of our Lord one thousand nine hundred and fifty-three.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

MINUTES OF JUNE 5, 1953

This case came on for hearing on the motion of defendant to set aside submission and to re-open case for further trial.

After hearing Mr. Picard, attorney for the defendant, it is ordered that said motion be denied.

Defendant marked for identification Defendant's Exhibits C and D.

Ordered this case again submitted on memorandums to be filed in 10-10 days, and continued to June 26th for submission.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

It is clear that the tariff classification "Olives, salt-cured, not preserved in liquid" was applicable to the olives for whose transportation plaintiff seeks to recover additional freight charges. Judgment may therefore enter in favor of plaintiff, upon findings of fact and conclusions of law to be presented according to the Rules.

Dated: July 9, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed July 10, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for trial before this court sitting with a jury, Honorable Louis E. Goodman presiding, A. T. Suter and Frederick E. Fuhrman of San Francisco, California, appearing for the plaintiff and Albert Picard of San Francisco, California, appearing for the defendant.

Said action was tried on May 11, 1953, and at the conclusion of plaintiff's case the jury was discharged. Evidence both oral and documentary was introduced on behalf of the parties, and after argument and filing of briefs, the said cause was submitted after which the court ordered that judgment be entered for the plaintiff, and the court now makes the following:

Findings of Fact

I.

That this action arises under a law of the United States regulating interstate commerce in that it arises under Section 6 (7) and other sections of Part I of the Interstate Commerce Act, under which this court has jurisdiction under Title 28, U. S. Code, Section 41, Subdivision (8).

II.

The plaintiff, Southern Pacific Company, is now and at all times herein mentioned was a corporation existing under and by virtue of the laws of the

State of Delaware, authorized to do and doing business in the State of California.

III.

That defendant, West Coast Products Corporation, is now and at all times herein mentioned was a corporation organized and existing under the laws of the State of California and having its principal place of business in the City and County of San Francisco, State of California.

IV.

That the defendant, West Coast Products Corporation, was the consignor and shipper of the following described shipments of olive products from Orland, California:

Car No.	Description of Shipment on Bill of Lading	Date of Shipment	Destination
PA 104387	540 Kegs Oil Coated Olives 53 Kegs Standard Size 80 Kegs Medium Size 243 Kegs Large Size 100 Kegs Extra Large Size 64 Kegs Mammoth Size	3/ 8/48	New York, New York
Wab. 86233	515 Kegs Oil Coated Olives 12 Bbls. Olives in Brine	3/17/47	New York, New York
T. & N. O. 59444	265 Kegs Sicilian Style Olives 25 Bbls. Sicilian Style Olives 100 Kegs Oil Cured Olives 5 Drums Olive Oil	4/ 6/49	Cleveland, Ohio
S. P.81989	65 Bbls. Sicilian Style Olives 190 Kegs Sicilian Style Olives 105 Kegs Oil Cured Olives	4/ 7/49	Buffalo, New York

V.

That the said shipments were transported by plaintiff as initial carrier and its connecting carriers and were delivered to the consignees thereof as directed by the defendant.

VI.

That freight charges for transportation of the said shipments have heretofore been paid in the sum of $3,972.13, including Federal transportation tax.

VII.

That all of the said shipments included either olives named "oil coated olives" or olives named "oil cured olives," all of which said olives were black olives which were salt cured and which were not preserved in liquid at the time of and during transportation of these said shipments.

VIII.

That at the time of and during transportation of the said shipments, Trans-Continental Freight Bureau, Eastbound Tariff No. 3-S, was duly posted, published, and on file with the Interstate Commerce Commission, and was lawfully in effect and applicable to the said shipments; that Item 5670 of said tariff contained tariff description reading in part as follows:

"Olives, salt cured, not preserved in liquid * * *."

IX.

That the total freight charges on said shipments

computed on the basis of the freight rate provided in said Item 5670, together with applicable increases thereon, are the sum of $5,447.64, and $44.26 in addition thereto as and for applicable Federal taxes.

Conclusions of Law

I.

That this court has jurisdiction of the subject matter and the parties to this action.

II.

That under the facts found herein the lawful freight charges for transportation of the said shipments are computed on the basis of the rate provided in Item 5670 of Trans-Continental Freight Bureau, Eastbound Tariff No. 3-S, together with applicable increases thereon, and are in the sum of $5,447.64; that defendant, West Coast Products Corporation, is lawfully obligated to pay to plaintiff the difference between freight charges and tax previously paid in the sum of $3,972.13 and lawful freight charges, in the sum of $5,447.64, or $1,475.51 plus Federal transportation tax thereon in the sum of $44.26, or a total of $1,519.77.

III.

That plaintiff have judgment against defendant, West Coast Products Corporation, in the sum of $1,519.77, together with interest at the rate of 6 per cent per annum computed from the date of the

entry of judgment herein and its costs of suit herein.

Let the judgment be entered accordingly.

Dated: July 23, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Receipt of copy acknowledged.

Lodged July 16, 1953.

[Endorsed]: Filed July 23, 1953.

In the District Court of the United States, in and for the Northern District of California, Southern Division

No. 29726—Civil

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff,

vs.

WEST COAST PRODUCTS CORP., a Corporation,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial on May 11, 1953, before the above-entitled court, sitting with a jury, Honorable Louis E. Goodman presiding, A. T. Suter and Frederick E. Fuhrman of San Francisco, California, appearing for the plaintiff and Albert Picard of San Fran-

cisco, California, appearing for the defendant, West Coast Products Corporation, at which time evidence both oral and documentary was introduced on behalf of the parties, and at the conclusion of plaintiff's case, said jury was discharged, and after argument and the filing of the briefs, the said cause was submitted. Thereafter the court rendered, made and filed herein its Findings of Fact and Conclusions of Law that plaintiff have judgment against the defendant. And now, the premises considered, it is hereby

Ordered, Adjudged, and Decreed that plaintiff, Southern Pacific Company, have judgment of and from defendant, West Coast Products Corporation, in the sum of $1,519.77, together with interest at the rate of 6 per cent per annum, to be computed from the date of entry of judgment herein and its costs of suit.

Dated this 23rd day of July, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form in accordance with Rule 5 (d).

.....
Attorney for Defendant, West Coast Products Corporation.

Receipt of copy acknowledged.

Lodged July 16, 1953.

[Endorsed]: Filed July 23, 1953.

Entered July 24, 1953.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Now comes West Coast Products Corp., a corporation, defendant in the above-entitled cause, and moves this Court for an order setting aside the decision and judgment herein and granting a new trial of the above-entitled cause for the following reasons, viz:

I.

Insufficiency of the evidence to justify the decision;

II.

That said decision is against law;

III.

Error in law occurring at the trial and excepted to by the said defendant.

IV.

Errors in law occurring at the trial and excepted to by the said defendant.

This motion will be based upon all the files, records and minutes of the above-entitled court in said action and upon the court reporter's notes of the testimony offered therein.

Dated: July 31, 1953.

/s/ ALBERT PICARD,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 1, 1953.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Good Cause appearing therefor, it is

Ordered that defendant's motion for a new trial herein be and the same is hereby denied.

Dated: August 7, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed August 7, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that West Coast Products Corp., a corporation, defendant above named, hereby appeals to United States Court of Appeals for the Ninth Judicial Circuit, from the judgment entered herein on July 24, 1953, and from the order denying defendant's motion for a new trial entered herein on August 7, 1953.

Dated: September 3, 1953.

/s/ ALBERT PICARD,
Attorney for Appellant.

[Endorsed]: Filed September 3, 1953.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, West Coast Products Corp., a corporation, defendant herein, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered July 24, 1953, by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of West Coast Products Corp., a corporation, appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and no/100 Dollars ($250.00), to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the court in the above-entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in

which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Signed, Sealed and Dated this 3rd day of September, 1953.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ ERBON DELVENTHAL.
Attorney-in-Fact.

Attest:

/s/ S. CLIMO,
Attesting Agent.

State of California,
City and County of San Francisco—ss.

On this 3rd day of September, A. D. 1953, before me, Belle Jordan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Erbon Delventhal, attorney-in-fact, and S. Climo, agent, of the Fidelity and Deposit Company of Maryland, a corporation known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the attorney-in-fact and agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said

Fidelity and Deposit Company of Maryland thereto as principal and their own names as attorney-in-fact and agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal] /s/ BELLE JORDAN,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires November 9, 1956.

[Endorsed]: Filed September 4, 1953.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DESIGNATE CONTENTS OF RECORD UNDER RULE 75A

For good cause appearing, it is hereby ordered that plaintiff, Southern Pacific Company, have to and including September 25, 1953, within which to designate contents of record on appeal herein.

Dated this 18th day of September, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 18, 1953.

In the Southern Division of the United States District Court for the Northern District of California

No. 29726

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff,

vs.

WEST COAST PRODUCTS CORPORATION, a Corporation,

Defendant.

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT
May 11, 1953

Appearances:

F. E. FUHRMAN, ESQ., and
A. T. SUTER, ESQ.,
For the Plaintiff.

ALBERT PICARD, ESQ.,
For the Defendant.

The Clerk: Southern Pacific Company versus West Coast Products Corporation, trial by jury.

Mr. Fuhrman: Read for plaintiff.

Mr. Picard: Ready for the defendant, your Honor.

The Court: Gentlemen, I have looked at the file

in this matter and I have some doubt as to the jurisdiction of this Court.

Mr. Fuhrman: If the Court please, I believe that the Court has jurisdiction by reason of the fact that this is a matter arising under the Interstate Commerce Act concerning interpretation of the act.

The Court: Well, the amount involved is about $1,400. The jury has been summoned here. The ordinary jurisdiction of this Court is $3,000. It is true, though, there is a section that has been in some instances construed if the action involves the procedure under the commerce act the jurisdictional not being present, but I never heard a suit just to recover an ordinary freight rate to be filed in the United States Court. If that was so, whenever somebody didn't pay their tickets of $75 from here to Chicago, the railroad could sue to collect it in the federal court. .I don't think any decision has gone that far. Has it? It is true in the regulatory practices——

Mr. Fuhrman: I don't know whether the cases go so far as giving the specific illustration just presented.

The Court: I think that there ought to be—if there is [2*] some case that holds that suits to collect freight bills and passenger traffic charges can be brought in federal courts no matter what the amount involved is, why, of course, that might be pretty persuasive. But the only cases I heard of or noticed in the books are those that involved some regulatory practices of the commerce statute where the reason for the exemption is that it has to do

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

with the enforcement of the regulatory rules with respect to commerce.

Mr. Fuhrman: Well, your Honor, I think I am fairly well familiar with a number of these cases that have come before the federal courts and frankly I don't know of any case at the moment which touches upon the jurisdictional question. I had assumed that since this was an action under the Interstate Commerce Act, a federal statute, that the federal court had jurisdiction as a result without regard to any amount. There are numerous cases which have gone to the Supreme Court of the United States—I am not sure at the moment whether they started in the federal court, but I do know of cases that have been brought in the federal court consistently without the question of jurisdiction having been raised, and I don't believe there is anything in the statute which sets any amount as limiting the Court's jurisdiction.

The Court: Well, there are a number of cases that involve the recovery of penalties under the statute of commerce regulation, and I have heard some, and I think the Supreme Court [3] decided that suit for tariffs under certain provisions was properly brought in the district court, even though the ordinary jurisdictional amount was not present, but I never have heard of a case brought in the U. S. court just to collect ordinary freight charges. If that were true——. Although it doesn't arise because the railroad company requires passengers to pay for their tickets in advance. But if it is true in principle, if I bought a ticket to Chicago

for a hundred and some odd dollars and I didn't pay for it, for some reason or other, the railroad company could sue me in the federal courts because it involves interstate commerce.

I don't know if there is any case that precisely held that.

What prompts my inquiry is that I don't think the parties have got any business taking up the time of the federal court when there is the matter of jurisdiction and all that is involved—whether the freight has been paid or not. The state court is available. It costs the United States to bring a panel of jurors here, it costs the United States over $200 just to bring the jurors here for one day, not counting if the case went any more than one day, to try a case involving $1,400. If I could find any way to send it in to the state court, I would do so, very frankly. I am not saying that particularly to the plaintiff or to the defendant. I assume you brought it here because you thought maybe you should bring it here. But the jury has been summoned and it is an unnecessary [3A] expenditure of time and effort and money of the United States in a civil proceeding, in my view. It does not involve the jurisdictional amount as we ordinarily understand it.

Mr. Fuhrman: May I say this, your Honor, this is one of about eight cases brought by the railroads in each of which I feel there is involved substantially the same question. The total charges are approximately $25,000. One action was brought about two years ago before this court and resulted

in judgment for the plaintiff, and as a result of that the defendant (who is the same defendant, and was the same defendant in another action) paid the charges, and another action was subsequently brought in the state court by another railroad and that was decided adversely to the railroad. It was felt when the first case was brought before this court involving a substantial sum of money in the aggregate that that would decide the issue for all of the case (at least I felt that way and certainly the attorney for the defendant, the same case, thought the same way in another action by another party).

The Court: If there is a question of law, yes. But if it is a question of fact, assuming that here is a jury summoned, that all there is going to be involved in this case is a question of fact, otherwise there wouldn't be a jury here, so I don't know how that would be in any way decisive of the other cases. Assuming there is something about olives and the question is if there is going to be a question of fact, [4] what was the character of the olives, if it is a question of fact that is involved, in the next case how do you know if you have the same question of fact?

Mr. Fuhrman: It is my position that it is a question of law primarily involved here as to which of two tariffs apply, and that is a question of law, and because of that thought I filed a motion for summary judgment in this action but Judge Roche felt that because there was a difference in the man-

ner in which the olives in this case were processed it would make a difference from a factual standpoint, but I argued that it was a question of law involved as to which of two tariffs apply.

And, furthermore, the plaintiff in this action did not request a jury. I can see no reason for a jury, and because of my own position——

The Court: Is there some dispute as to the manner in which the olives were processed?

Mr. Fuhrman: No, absolutely none. We agree entirely with the manner in which they were processed. There are two tariffs involved here and we are seeking to apply one or the other of these tariffs to these particular shipments. We tried one case and it is conceded that it was a different method of processing, but the end result was the same, and in my opinion this case should go along with that previous case. Judge Roche——

The Court: Mr. Picard, do you say there is any question of [5] fact involved?

Mr. Picard: If your Honor please, may I first—so that the matter is formally before the Court—at this time move that the action be dismissed upon the ground that this Court has no jurisdiction of the subject matter of the action, the amount being involved being less than $3,000.

The Court: Well, on the other question——

Mr. Picard: On the other question, if your Honor please, in my opinion it is a question of fact. Counsel endeavored to make the same argument, which counsel is making to your Honor, before Judge Roche, the judge who tried the other case

which was decided in his favor, and Judge Roche denied his motion for summary judgment.

I think since this complaint was drawn and since we have gone into this matter more thoroughly, counsel has somewhat changed his views on this matter, although he seems to still persits in them. His complaint was drawn upon the theory solely that these were salt cured olives and that therefore he was entitled to recover the greater rate.

Now the tariffs do not read that way, your Honor. The tariff for the lower rate which was actually charged by the——

The Court: Mr. Picard, I don't want to interrupt you, but I don't think this is the proper time to argue the matter. All I am trying to inquire about is whether irrespective of whether or not—irrespective of Judge Roche's action on the [6] motion for summary judgment, which presents only the question as to whether or not the matter can be decided in the summary manner—that is all it decides——.

Now, if it develops that there is nothing for the jury to decide in this case as a factual matter, the case would still be tried before the Court without a jury and that matter resolved. All I am trying to find out is whether it is necessary to keep the jury here in this case at the expense involved if the parties themselves are in agreement as to the facts as to what happened but are in dispute as to which tariff applies.

Mr. Picard: Well, it seems to me, if your Honor please, and that is why I asked for a jury, that it

is a factual matter and that is what I was endeavoring to explain to your Honor when your Honor said you didn't want me to argue the matter.

The Court: You were arguing about the theory of the case.

Is there a question of fact as to the type of this commodity?

Mr. Picard: If your Honor will bear with me for just a moment, I think I will show you there is. In my opinion there is.

The Court: You say there is?

Mr. Picard: I think so, your Honor. I think, if your Honor please, your Honor's point is good.

Mr. Fuhrman: Your Honor, may we make this suggestion, we took the deposition of the officer of the defendant prior to [7] this trial and the purpose of this was to dispose of this case. And to show how I feel about the facts, I am willing to accept every statement of fact made in the defendant's deposition and have the Court apply those facts to one or the other of the two tariffs which are involved in the case.

Now that is the defendant's own statements of what the factual situation is, and that is how I feel, there is no issue as to the fact. It is just a question of which one of the two tariffs apply to those facts.

Mr. Picard: Without waiving the point, if your Honor please, that your Honor's original point is good, that this action should be dismissed for lack of jurisdiction, the question here is just one ques-

tion and that is whether these olives were preserved in liquid, and I think that is a question of fact.

The Court: Well, counsel says he is willing to accept the defendant's statement of that.

Mr. Fuhrman: All of the evidentiary facts are included in the deposition, your Honor. It is just a question of whether—of what conclusions are to be drawn from those evidentiary facts and that would be a function for the Court in any event.

Mr. Picard: I don't know what counsel seeks to show, but I expect to show, your Honor, that the olives are actually preserved in juice. I expect to show also that for 25 years or more the plaintiff here has always charged this lower rate, the [8] rate which was originally charged against the defendant.

The Court: That does not raise any factual question.

Mr. Picard: That would be a question of law.

The Court: That would be a question of law. I am not trying to tell you to——. I am just going to find out whether or not it is necessary to—if there is any fact for the jury to pass upon now. There is no use in keeping them here if there isn't. If there is nothing but a question of law to pass upon, I wouldn't submit it to the jury, anyhow; and if I did submit it to the jury and there was no factual basis for the decision, I wouldn't let it stand, anyhow, if it is only a question of law involved.

The presence of the jury isn't going to add any-

thing to the case if there is no factual question involved. That is all I am trying to find out.

The question then that is to be determined is whether the olives were or were not preserved in juice or liquid other than alcoholic, that the rate you would charge is under an item which applies to olives preserved in juice or syrup or liquid other than alcoholic. The rate for which they contend is for olives salt cured, not preserved in juice, so the question of fact is whether they were preserved in juice or not? What do you say to that? Is that the question of fact?

Mr. Fuhrman: If you want to call it a question of fact. But we have the facts in the deposition, which we are willing [9] to agree to, your Honor. They are evidentiary facts as to the manner of the processing, the manner in which they were shipped, and then the only other question involved is this, does tariff A and tariff B apply to those facts?

The Court: That is a question of law. You say you are willing to accept the statement of defendant as to the manner in which the preservation of the olives——

Mr. Fuhrman: The manner in which they were processed and shipped.

The Court: If the defendant's testimony in that regard is accepted by the plaintiff, is there any question of fact?

Mr. Picard: Let us concede that there is no dispute on how the olives are processed, which counsel says, than is it a question of fact or is it a question of law to determine whether those olives are pre-

served in juice or not preserved in liquid, preserved in liquid or not preserved in liquid; wouldn't that be a question of fact?

Mr. Fuhrman: The evidentiary facts speak for themselves, your Honor. There is just the conclusion to be drawn from those evidentiary facts.

Mr. Picard: I thought it was a question of fact, your Honor. That is why I asked for a jury.

The Court: What would the jury decide, whether something is a liquid or is not a liquid?

Mr. Picard: Whether they are processed in liquid or not— [10] whether they are preserved in liquid or not preserved in liquid. That is the question involved in the case.

The Court: The defendant's deposition was taken. Is he to testify in this case?

Mr. Picard: They asked that I produce him. I would have brought him, anyway. He is the man who is in charge of the processing of the olives at the defendant's plant, your Honor. I haven't heard anything——

The Court: You are not willing to stipulate that the case be tried before the Court without a jury?

Mr. Fuhrman: I am willing to make that stipulation, your Honor.

Mr. Picard: Well, let me speak to my client.

The Court: You speak to him. All I am interested in is just saving unecessary expense in the matter. That may be only a question of law and in this case there is only involved a small sum of money.

(Discussion off the record between counsel and client.)

Mr. Picard: They do not wish to waive a jury.
The Court: All right, call the roll of jurors.

(Thereupon a jury was duly impaneled and sworn.) [11]

Opening Statement on Behalf of Plaintiff

Mr. Fuhrman: If the Court please, ladies and gentlemen of the jury, as you have already surmised, this case is about olives.

Some years ago, back in 1948, 1947, at or about similar dates, the defendant corporation, which is located at Orland, California, shipped four carloads of olives over the lines of Southern Pacific Company and connecting carriers, two carloads to New York, one to Cleveland, one to Buffalo.

I don't know whether you people are familiar or not with what you prepare when you ship anything on the railroad. You prepare a bill of lading. It is a document made up in several copies and the person who has the product to ship prepares this document. He lists what he has got on there.

The controversial item in this case on the bill of ladings that were prepared by the defendant are coated olives and olives called oil-cured olives in There were several hundred kegs of these olives in these four carloads. That's all he said about oil-cured or oil-coated olives.

There were also other kegs of different kind of olives in there, such as olives in brine.

Now these bills of lading and freight carloads

of olives were presented to our agent at Orland. He took these bills of lading. He looked at the description. He wasn't clear from the information that was on the bill of lading which rate [12] applied. So he applied the lower rate.

Later on it developed, in a very thorough investigation, very careful consideration of all of the facts, that a higher rating applied to these olives, by reason of the fact in which they were prepared and packed.

The two descriptions that will be before you in this case are as follows. These descriptions are in the tariffs of the railroad on file throughout the United States with the Interstate Commerce Commission and the Public Utilities Commission. Everybody is bound by a tariff. It is just like a law. Whether you know it or not, you are bound by it; in order to conduct any reasonable semblance and normality of business, that has to be the situation.

One description was as follows:

> "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

The other description:

> "Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails."

From those two words that I gave you that were written on the bill of lading, the agent could not tell which description applied. To be on the safe side, in the first instance, he charged them the lower rate.

The Court: Which was the lower rate?

Mr. Fuhrman: The lower rate was olives canned or preserved [13] in juice or in syrup or liquid other than alcoholic. That is the rate that was charged. That was the rate that was prepaid on these carloads.

Later on, it developed that the higher rate, from the nature of the commodity, should have applied.

We asked the defendant to pay these additional charges. We submitted freight bills. He refused to pay them. This lawsuit resulted.

You may wonder why we sue a customer. It is bad business to sue your customers. You are going to lose future business. That may be true, ladies and gentlemen, but the railroads are bound by the provisions of the Interstate Commerce Act, and for those of you who are not familiar with that act, it was designed originally to correct the abuses that shippers and the railroads engaged in in the early days of railroading in this country. Sometimes the railroad would discriminate by a freight rate in favor of one person as against another. They would charge one man less for shipping the same commodity than they did another man for shipping the very same commodity.

Well, as you can see, if you can get a cheaper freight rate than your competitor, you will soon have a vicious weapon that you can use against your competitor in any business. Those of you who are in business will understand that. The act was designed to prevent discrimination among shippers or receivers of freight. Everybody has to be

charged the same rate, regardless [14] of whether or not they think it is reasonable.

It is for that reason we filed this lawsuit. We know that the law requires us to collect the applicable freight charges on any given movement. We believe that the olives oil-cured or oil-coated in this case properly fell under the description "Olives salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails."

The Court: Do you wish to make a statement at this time?

Mr. Picard: I would like to make a statement at this time, your Honor.

Opening Statement On Behalf of the Defendant

Mr. Picard: May it please your Honor, you, ladies and gentlemen of the jury, our defense in this action is that the rate which was actually charged by the railroad company under the designation which was given of the olives, this oil-cured or oil-coated, is the proper charge and that the railroad company is not now entitled to seek any further amount.

We will show you exactly how these olives are handled. We will show you that all of the salt was completely cleaned and washed off these olives, that they were then manipulated and a quantity of olive oil was used in such manner that every olive was oil-coated and that was done for the purpose of preserving the olives, and the olives were therefore preserved in a liquid other than alcoholic. [15]

We will show you that when they are put in the

barrels, through the reaction of the olive oil and the juice in the olive itself, a liquid forms which covers about one quarter to one-third of the barrel or keg in which they are shipped and that therefore they are actually preserved in liquid.

We believe that you will find that there was no mistake made by the station agent, that there was no doubt in the mind of the station agent because this type of olives have been shipped for more than 25 years, and this lower rate, the rate which was actually charged by the railroad company, is the rate which was always charged by the railroad company for this type of olives and is the proper charge which should be made for them.

Counsel has read you the two items of the tariffs which are here in question and, eliminating the unnecessary parts of it, I think this case resolves itself to a very simple question of fact, and that is were the olives, here in question, preserved in juice or liquid? I think that is the only question that is before you.

The one tariff which we claim is applicable here provides for olives "canned or preserved in juice or syrup or liquid other than alcoholic." In other words, the essential there is that they were preserved in juice, syrup, isn't applicable here. In juice or liquid other than alcoholic. Certainly olive oil is the liquid other than alcoholic. Certainly the [16] juice of the olive itself is a liquid other than alcoholic. Therefore, if you find that the olives in this case were preserved in juice or olive oil and they were all coated with olive oil for the pur-

pose of preserving them, then you must necessarily find that the lower tariff, the charge which was actually made, is a proper charge.

In order that the plaintiff can sustain its position in this case, the burden of proof is upon the plaintiff to prove that these olives were not preserved in liquid. In other words, if they were preserved in juice, if they were preserved in olive oil, if the coating of them in olive oil was a preservation, we believe that you will necessarily find that the plaintiff is not entitled to recover in this action and that the defendant is entitled to a verdict at your hands.

Thank you.

Mr. Fuhrman: I think at the outset I would like to read in evidence the Request for Admissions and the answers thereto.

The Court: The plaintiff's Request for Admissions?

Mr. Fuhrman: To the defendant, your Honor.

The Court: And the defendant's answers thereto?

Mr. Fuhrman: Yes.

Request for Admissions—if I may explain very briefly—are a set of questions that are prepared by any party to the case under oath and submitted to the other side, and they have to answer them under oath as well. [17]

In this case the plaintiff, Southern Pacific Company, prepared a set of questions under oath and submitted them to the defendant, who answered them under oath.

"Request for Admissions. The plaintiff, Southern Pacific Company, requests the defendant, West Coast Products Corporation, within ten days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial.

"That each of the following statements is true:

"1(a) That on or about March 8, 1948, at Orland, California, defendant tendered to plaintiff car PA 104387 containing olives for shipment to New York, New York."

The defendant admitted that was true.

"1(b) That Exhibit A attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 1(a)."

The defendant admitted that was true.

"1(c) That the document described in paragraph 1(b) was signed on behalf of the [18] defendant by H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of defendant."

Defendant admits the truth of that statement.

"Statement 1(d):

"That the facts stated in the said Exhibit A are correct."

Exhibit A is a copy of a bill of lading, which you may look at later in the case.

> "1(e) That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit A."

The defendant admitted the truth of that statement.

> "2(a) That on or about March 17, 1947, at Orland, California, defendant tendered to plaintiff car Wabash 86233 containing olives for shipment to New York, New York."

Defendant admitted the truth of that statement.

> "2(b) That Exhibit B attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 2(a)."

The truth of that statement was admitted.

> "2(c) That the document described in paragraph 2(b) was signed in behalf of the defendant by H. L. [19] Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of the defendant."

Defendant admitted the truth of that statement.

> "2(d) That the facts stated in the said Exhibit B are correct."

Defendant admitted the truth of that statement.

> "2(e) That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit B."

The defendant admitted the truth of that statement.

"3(a) That on or about April 6, 1949, at Orland, Califoria, defendant tendered to plaintiff car T&NO 59444 containing olives for shipment to Cleveland, Ohio."

The defendant admits the truth of that statement.

"3(b) That Exhibit C attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 3(a)."

The defendant admitted the truth of that statement.

"3(c) That the document described in paragraph 3(b) was signed by A. P. Paoni, per S.A.K.; that the said party who signed the said document was at said time of signing a duly authorized [20] representative of the defendant."

The defendant admitted the truth of that statement.

"3(d) That the facts stated in said Exhibit C are correct."

The defendant admitted that one, too.

"3(e) That the plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit C."

The defendant admitted that.

"4(a) That on or about April 7, 1949, at Orland, California, defendant tendered to plain-

tiff car SP 81989 containing olives for shipment to Buffalo, New York."

Defendant admitted the truth of that statement.

"4(b) That Exhibit D attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 4(a)."

That is admitted by the defendant.

"4(c) That the document described in paragraph 4(b) was signed in behalf of the defendant H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of the defendant."

Defendant admits that, too. [21]

"4(d) That the facts stated in the said Exhibit D are correct."

That is admitted by the defendant.

"4(e) That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit D."

That is admitted by the defendant.

"5(a) That the amount of freight charges collected by plaintiff for transportation of shipment in car PA 104387 was $938.18 including tax."

That is admitted by the defendant.

"5(b) That the amount of freight charges

collected by plaintiff for transportation of shipment in car Wabash 86223 was $943.72 including tax."

Defendant admitted that.

"5(c) That the amount of freight charges collected by plaintiff for transportation of shipment in car T&NO 59444 was $1061.37 including tax."

Defendant admitted that.

"5(d) That the amount of freight charges collected by plaintiff for transportation of shipment in car SP 81989 was $1028.86 including tax." [22]

That was admitted by the defendant.

"6. That the freight charges referred to in paragraphs 5(a), 5(b), 5(c) and 5(d) were assessed and computed on the basis of a rate provided in Item 3800 of Trans-continental Freight Bureau Eastbound Tariff No. 3-S for commodities described as:

'Olives, canned or preserved in juice, or in syrup or liquid other than alcoholic.' "

"7. That Item 5670 of Trans-continental Freight Bureau Eastbound Tariff No. 3-S provides straight rate which is applicable to shipments moving from Orland, California, to eastern destination described as:

'Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails.' "

Now the defendant admits 6, he admits the last one, 7, subject to qualification—that I will explain later.

> "8.(a) That freight charges on the shipment in car PA 104387, covered by shipment document identified as Exhibit A, computed on the basis of the rate referred to in Paragraph 7 herein, are the sum of $1304.66."

That was admitted, and with the qualification that I will [23] explain later.

> "8(b) That freight charges on the shipment in car Wabash 86233, covered by shipping document identified as Exhibit B, computed on the basis of the rate referred to in paragraph 7 herein, are the sum of $1312.36."

He admits that, too, with the qualification.

> "8(c) That freight charges on the shipment in car T&NO 59444, covered by shipping document identified as Exhibit C, are in the sum of $1403.82, and in computing the said sum the rate referred to in pargraph 7 herein, was applied to the 100 kegs of oil-cured olives in said car."

He admits that, too, subject to the qualification.

> "8(d) That freight charges on the shipment in car SP 81989, covered by shipping document identified as Exhibit D, are in the sum of $1,426.80, and in computing the said sum the rate referred to in paragraph 7 herein, was applied to the 105 kegs of oil-cured olives in said car."

He admits that, too, subject to qualification.

> "9. That if the freight charges as computed in 8(a), (b), (c) and (d) above apply to the movement of said four freight cars, then the defendant owes to the plaintiff the sum of $1,475.51 [24] for freight charges and $44.26 federal tax on said sum of freight charges."

He admits that, too, except that he makes the statement—I should say the defendant corporation, rather than he, admits that also, except that he makes a further statement, as he had this morning before us all, that he contends that the freight rate on the olives preserved in liquid applies and not the rate on olives salt-cured and not in liquid.

Shall I offer them physically in evidence or shall I——

The Court: You can offer the answers and the documents as exhibits, if you wish to.

Mr. Fuhrman: I think I will do so. I offer them.

The Court: No objection?

Mr. Ricard: No objection.

The Court: All the answers and the documents attached will be admitted in evidence.

Mr. Fuhrman: Call Mr. Paoni.

AMADEO PAONI

(Thereupon Amadeo Paoni, an adverse witness called by the plaintiff, was duly sworn and testified as follows:)

The Clerk: Please state your name to the Court and to the jury.

A. Amadeo Paoni.

Mr. Fuhrman: I would like the record to show that Mr. Paoni is being called as an adverse witness. [25]

Direct Examination

By Mr. Fuhrman:

Q. Mr. Paoni, do you recall back on August 7, 1952, when your deposition was taken in the presence of Mr. Suter and Mr. Picard before a notary public and a reporter A. I do.

Q. Do you remember at that time that you were asked questions under oath and that you gave your answers thereto? A. Yes, sir.

Q. Mr. Paoni, the olives called oil-cured or oil-coated that were in the four carloads of olives involved in this case were Mission olives, were they not? A. Yes, sir.

Q. And they were ripe olives?

A. Yes, sir.

Q. When you first received those olives, that was some time generally in the month of December, isn't that right? A. Yes, sir.

Q. The first thing you do with them is run the olives through a grader, is that right?

(Testimony of Amadeo Paoni.)

A. Yes, sir.

Q. Why do you run them through a grader?

A. For size and to take out the olives that are bad.

Q. You wash them, get off the dust and dirt?

A. Wash them to take off the dirt and dust. [26]

Q. And you put them in a wooden bin, don't you? A. Yes, sir.

Q. Is that bin about six by six by five feet?

A. About.

Q. What else do you put in the wooden bin with the olives? A. Salt, rock rock.

Q. Rock salt? A. Yes, sir, rock salt.

Q. You first put a layer of olives, do you?

A. Yes, sir.

Q. About how thick is that layer?

A. About four, five inches.

Q. Then you put a layer of salt on that?

A. Yes, sir.

Q. How much salt? A. About one inch.

Q. Then some more olives and more salt?

A. Correct.

Q. Until you get up to the top?

A. Correct.

Q. It is my understanding that you leave those olives in it, together with the salt, for a length of time—it depends upon the weather, is that right?

A. Right.

(Testimony of Amadeo Paoni.)

Q. And what is the shortest length of time you leave the [27] olives and the salt together?

A. Three or four weeks.

Q. What is the longest time that you might leave it together?

A. Five or six weeks.

Q. What determines how long you leave the olives and the salt together?

A. Pardon me?

Q. What determines how long you will leave the olives and the salt together?

A. Well, the salt extracts the water from the olives—extracts the water from the olives and the juice from the olives and the salt together.

Q. Just a minute now. I don't think you understood my question. What determines whether you leave them in there three or four weeks or a longer period of time?

A. It depends upon the weather.

Q. The weather, is that right? If the weather is dry, how long do you leave them there?

A. If the weather is dry, the salt doesn't dissolve in the water fast and it takes longer. If the weather is mildly wet, raining, the salt dissolves faster and it works in the olives much quicker.

Q. Now, when you take the olives out of the bin, you shake all the salt off?

A. Right. [28]

Q. You have a machine for that?

A. Yes, we have a machine.

Q. Is it an electric machine?

(Testimony of Amadeo Paoni.)

A. (No answer.)

Q. There is no longer any more salt on the outside of the olives?

A. No salt on the outside of the olives.

Q. Now you dip them in water, don't you, to clean them up?

A. We dip them in water because—we dip them in water, fresh water, to dissolve the salt completely.

Q. Then you spread them out on a table, don't you? A. Right.

Q. Then you put oil on them? A. Yes.

Q. Now, as I understand it, for about 100 pounds of olives, you will use half a gallon of olive oil, is that right? A. Right.

Q. You then put them on this table that rolls the olives around in this oil?

A. That's right, put all the olives. To get all the salt out of the olives, to get the salt in the oil.

Q. They get a coat of oil on the olive?

A. On every olive.

Q. How long does that take? A. Take?

Q. To roll them around on the table.

A. Well, five minutes to a keg.

Q. And a keg has about how many pounds?

A. 100 pounds.

Q. That is net? A. Net, yes.

Q. How much does the keg weigh, if you know?

A. The gross weight?

(Testimony of Amadeo Paoni.)

Q. Yes. A. With the keg only?

Q. Just the keg alone, without——

A. About 12 pounds.

Q. So the gross weight of the keg altogether would be 112 pounds? A. 112 pounds.

Q. Then you put the olives—you fill the barrel up with the olives, don't you? A. Yes.

The Court: That is after they have been rolled in the oil?

Mr. Fuhrman: Yes.

Q. Then you cap the barrel?

A. Yes, sir.

Q. What kind of a cap do you put on them?

A. To cover it, first put a layer of paper first, to keep the olives, so the olives don't go in contact with the wood, and [30] then we put a wood cover over that.

Q. Is it a wooden barrel?

A. Wooden barrel.

Q. Will you illustrate how high the barrel is?

A. About 22 inches.

Q. 32? A. 22.

The Court: Excuse me just a moment. I want to excuse the rest of the jurors.

(Thereupon those jurors called, but not selected were excused.)

Q. (By Mr. Fuhrman): Tell us again the size of that barrel?

A. It is about 22 inches high.

Q. Is that the long part of it?

A. The height of the barrel.

(Testimony of Amadeo Paoni.)

Q. How wide is it?

A. Oh, about 16 inches.

Q. 16 inches? A. Diameter.

Q. How far through is it, Mr. Paoni?

A. About 16 inches.

Q. I am a little confused about the size of that barrel, Mr. Paoni, because in your deposition you said it was 23 inches high and 52 inches in diameter.

A. I misunderstood. That is not correct. [31]

Q. So that we will have no doubt about it now, will you tell us what is right? A. Yes.

Q. What is right now?

A. 23 inches high, about 16 inches in diameter.

Q. 23 high? A. 23 high.

Q. Do you know about how much liquid is in the keg after you cap it and finish and get it ready for shipment?

A. Between the oil and the liquid that comes from the olives themselves, there is about six, eight inches on the bottom of the keg.

The Court: You don't put any liquid in the barrel?

A. No. The olives themselves have got liquid.

The Court: You take the olive after it has been rubbed around in the oil and put it in the barrel?

A. Yes, sir.

The Court: And then what liquid gets into the bottom of the barrel is deposited from the olives?

A. From the olives.

(Testimony of Amadeo Paoni.)

The Court: Is this witness competent to say that was the process that was followed with respect to these particular olives?

Mr. Fuhrman: Yes. I can qualify him further in that respect, and I intend to do so. [32]

Mr. Picard: I will stipulate that he is the man who is in charge of the processing of the olives with the defendant.

Q. (By Mr. Fuhrman): You are the vice president of the defendant corporation, are you not?

A. Yes, sir.

Q. So that after the barrels are capped and ready for shipment, there is about six or eight inches of liquid in the barrel? A. In the barrel.

Q. Those olives are not sold in California, are they, Mr. Paoni?

A. Well, they sell very little in California. I don't know. We only ship in the east. We don't sell any in California.

Q. What does the salt do to the olives?

A. Pardon me?

Q. What does the salt do to the olives?

A. Extracts water from the olives.

Q. Now, you also pack another kind of olives, don't you? A. Yes, sir.

Q. Is that a green olive?

A. Green olives.

Q. Now green olives, you clean them up the same way you do the ripe ones? A. Yes, sir.

Mr. Picard: Before counsel goes into this sub-

(Testimony of Amadeo Paoni.)

ject, I don't think that green olives subject is relevant here, your Honor, [33] because we are dealing only with the type of olives that have been fully described by the witness.

The Court: You mean that is all that was involved in the shipments?

Mr. Picard: The only olive that is involved in the shipment, the only olive in question here, the only olive upon which they seek any righer rates.

Mr. Fuhrman: I think it is admissible, on two grounds, and quite relevant to the matter, because it illustrates another method of packing olives, a method that properly falls under one rate whereas we contend the other method illustrates the other rate. Not only that, these kinds of olives were included in this shipment, in some of these carloads.

The Court: Well, you are in dispute as to whether there were green olives in the shipment?

Mr. Fuhrman: No, there is no dispute.

The Court: I will overrule the objection.

Mr. Fuhrman: Now these other olives, after you clean them up——

The Court: These other olives—you are now referring to green olives?

Mr. Fuhrman: Green olives.

Q. (By Mr. Fuhrman): You understand me don't you? A. Yes.

Q. I don't want to confuse you. [34]

A. I understand.

Q. You put them in a vat, don't you?

A. Yes, sir.

Q. How large is the vat?

(Testimony of Amadeo Paoni.)

A. About six feet by six feet and by five.

Q. Similar to the other size one?

A. The only thing, it is cement, The other one is a wooden bin.

Mr. Picard: May it be stipulated that the objection which I made to the previous question may be deemed to have been made to all questions along this line?

The Court: With respect to the green olives?

Mr. Picard: Yes.

The Court: Very well.

Mr. Picard: They are not part of this action at all.

The Court: Very well. The record will show that.

Q. (By Mr. Fuhrman): Now, in this other bin with the green olives, you put a brine solution?

A. We make a brine solution, water and salt, before we put the olives in.

Q. What is brine, Mr. Paoni? What is brine? Explain what brine is.

A. Brine is the salt diluted in water.

Q. And when you start out, you start out with how big a solution? [35]

A. Well, about 15 degrees by salinometer.

Q. What do you end up with?

A. End up with 30 degrees.

Q. What is a salinometer?

A. That is what you measure—a salinometer is something to give the test, the strength of the brine.

Q. What kind of salt do you use there?

(Testimony of Amadeo Paoni.)

A. Rock salt.

Q. Now you keep them in there, in this liquid solution about two to three months, do you not?

A. Yes, sir.

Q. As a matter of fact, you never take them out of that, do you? A. No, sir.

Q. And you ship them in that same solution?

A. The same solution, the same brine. The same brine.

Q. These olives that are in this brine solution, in the barrel of the brine, the brine comes up to the top of the barrel, doesn't it?

A. Will you repeat it?

Q. I say, when you pack these green olives in the brine in the barrel, the solution, the brine comes up to the top of the barrel, doesn't it?

A. Yes.

Mr. Fuhrman: I would like to offer the deposition, your [36] Honor, into evidence.

The Court: Well, you have got him here as a witness.

Mr. Fuhrman: Very well. I believe that is all, Mr. Paoni.

The Court: Just a moment, Mr. Paoni.

Cross-Examination

By Mr. Picard:

Q. Now, Mr. Paoni, you have described to us that after the olives are taken out from the brine, or whatever you may call what you keep them in with the salt, you wash them; first you dry them, and then you wash them thoroughly, and then you

(Testimony of Amadeo Paoni.)

put them on a table and you have them manipulated with olive oil?

The Court: You are talking now about ripe olives?

Mr. Picard: The ripe olives. The ripe olives are the only olives in this case.

The Court: Just so there is no confusion.

Mr. Picard: Yes, your Honor. The ripe olives. I am talking about the Mission olives, the ripe olives.

Q. (By Mr. Picard): And you take them, put them on a table, and you manipulate them so that every olive is covered with oil? A. Right.

Q. What is the purpose of covering them with oil?

A. To keep the olives, to keep the olives so they don't get spoiled. If the olives are not covered with oil, they dry up and don't keep the flavor. It is to keep the olives. [37]

Q. That is to preserve the olives?

A. To preserve the olives.

Q. When the olives are put in the barrel, between the oil and the juice of the olives, you say a liquid forms?

Mr. Fuhrman: Just a minute. He didn't say anything of the kind, to my knowledge. I object to the question. It does not cover the evidence and it is leading.

Mr. Picard: That is why I asked him. I will ask him. I understood that is what he said.

Q. (By Mr. Picard): Now after you put the

(Testimony of Amadeo Paoni.)

olives in the barrel, after they have been coated with the oil—— A. Yes.

Q. ——you put them in the barrel and you cover the barrel. What happens?

A. The olives have got moisture in them that comes out from the olives mixed with the salt, and it makes the juice to preserve the olives.

Q. That is the juice of the olives in the olive oil that you coated them in? A. Olive oil.

The Court: You said to me that went to the bottom of the barrel.

A. Yes. The juice goes down to the bottom of the barrel.

The Court: You said it was about——

A. About six inches. [38]

The Court: About six inches, on the bottom of the barrel.

A. Yes.

The Court: From the olives, that was their liquid?

A. Yes.

Q. (By Mr. Picard): Well, if the barrel is turned, what happens to the juice?

A. Well, when the barrel is turned—they keep turning the barrels and the juice is still going up and down, you see, and it keeps water around the olives.

Q. So all the olives are preserved in the juice?

A. Because the, to take care of it keeps the barrels rolling and turning them over.

(Testimony of Amadeo Paoni.)

Mr. Picard: I have here a jar of olives, Mr. Paoni. I will ask that you tell us what that is.

Mr. Fuhrman: Just a minute, now. I am going to object to this jar at this time. I don't think it is proper on cross-examination. If you want to call him as you own witness later on. I called him as an adverse witness. I didn't examine him——

The Court: Apparently there is not much dispute as to the facts of the matter one way or the other, so I don't see the difficulty. The attorney has not yet laid a foundation for this as yet, so I don't see how to rule on it as yet. I can't rule on something until I really know where it is leading.

Mr. Fuhrman: Very well. I will withdrawn my objection. [39]

The Court: You say, "What is it"? Well, it is a jar of olives, I take it.

Q. (By Mr. Picard): What kind of olives?

A. These are oil-coated olives taken from the kegs that were shipped.

Q. Are these the type of olives that were shipped in the four shipments that are here in question?

A. Correct.

Q. And these are the olives upon which the Southern Pacific Company charged the lower freight rate?

A. That is the olives cured and shipped this way. Always cured and shipped this way.

The Court: Mr. Picard, bring out how he knows that. Did he take some part——

Mr. Picard: I think I'd better do that.

(Testimony of Amadeo Paoni.)

Q. (By Mr. Picard): What is your position with the West Coast Products Corporation, Mr. Paoni, other than being vice president, I mean?

A. I am a partner.

Q. Well, it is a corporation, so you are a stockholder? A. Yes, I am a stockholder.

Q. What do you have to do with the processing and the shipment of olives?

A. I supervise the processing.

Q. You supervise the processing?

A. Yes. [40]

Q. Now you described the process to us here this morning, principally in answer to questions from adverse counsel. A. Yes.

Q. Are you in charge of that processing?

A. Yes, I am in charge of the processing.

Q. And were the four carloads of olives which were shipped here and which are in question here processed, coated with oil, put in kegs and shipped in the manner you described this morning?

A. Correct.

A. And the olives you hold in your hands, are they olives which, to your own knowledge, were processed in the manner that you have described here this morning? A. Yes, sir.

The Court: How does he know that those are the olives that got in those barrels? Why don't you bring that out?

Mr. Picard: All right, your Honor.

Q. How do you know that this bottle that you are holding in your hand is the same type of olive?

(Testimony of Amadeo Paoni.)

A. Because I picked these myself from the kegs and brought them down to you.

Q. You took them yourself and brought them down to be offered in court? A. Yes.

The Court: You mean from these kegs, these very kegs that [41] were shipped?

Mr. Fuhrman: No.

Mr. Picard: I wouldn't say they were the very kegs that were shipped, your Honor.

The Court: Oh, I see what you are trying to do.

Mr. Picard: Similar.

Q. Do you process all your oil-coated or oil-cured olives in the same manner you described this morning? A. Yes, sir.

The Court: What do you do, take some of these olives—or what did you do, take some of these olives out of some of the kegs that were ready for shipment, and you took some of them out and you put them in these glass jars to bring them here today?

A. Yes, your Honor.

The Court: All right.

Mr. Picard: I will offer these olives, if your Honor please, this jar of olives, as defendant's Exhibit A, and I would like to exhibit them to the jury.

Mr. Fuhrman: I think I am going to object to it, your Honor. I don't think the proper foundation has been laid. I don't think it is material to the matter which has been presented.

Mr. Picard: The Court would like to see them, Mr. Paoni.

The Court: Well, I don't see what purpose would

(Testimony of Amadeo Paoni.)

be [42] served by seeing some olives that have been brought here, taken out of a——

Mr. Picard: I believe, if your Honor please, it is clear in looking at them that they are moist, that they are preserved in liquid.

Mr. Fuhrman: That is just a conclusion of counsel.

The Court: All I can do is look at them the way they are here.

Mr. Picard: I think that is the main thing for the jury to determine here, whether they are preserved in juice or liquid.

The Court: These are in the same condition as the ones in shipment?

Mr. Picard: The witness has so testified, your Honor, and he was in charge of processing these and he was in charge of processing those that were shipped. He has been in charge of all of the processing there.

Mr. Fuhrman: There has been no foundation laid as to time of processing at all, your Honor, or anything of that nature, your Honor. The foundation seems——

The Court: I think you would have to lay a little more foundation, perhaps, Mr. Picard, as to the manner—where these olives came from, what time, and so forth.

Q. (By Mr. Picard): Referring to the jar of olives which you now hold in your hand, Mr. Paoni, where did you bring these [43] from?

(Testimony of Amadeo Paoni.)

A. From our plant in Orland.

Q. When were these olives processed that you hold in your hand?

A. Processed last month, the month of March.

Q. In the month of March—and this is now the month of May.

Now, the olives which were shipped in the four carloads which are here in question, how long before they were shipped were they processed?

A. Well, about, we process and ship them in the time. I can't remember exactly how long before they were shipped.

Q. Was it approximately the same length of time before shipment as the length of time between processing and the——

A. Usually we ship around ten days' time, a car in ten days. It depends when they are ready for shipment, then we ship a car.

Mr. Picard: Does that satisfy your Honor?

Mr. Fuhrman: I don't even understand that last answer.

(Answer read back by reporter.)

The Witness: May I make it a little more clear, your Honor?

The Court: Yes.

A. Assume we have a car ready, and we have a quantity enough, we ship. If we have an order to ship them and don't have enough, we mix with the shipment other olives to make up the [44] car. We don't keep it any longer.

Q. (By Mr. Picard): Did you hold these, those

(Testimony of Amadeo Paoni.)

in the jar in your hand, the same length of time as the other olives which you shipped in the four carloads in question?

A. Well, I couldn't say that. More or less, yes.

Q. Would a few days more or less make any difference in the olives in their appearance?

A. It doesn't make any difference because the olives——

Mr. Fuhrman: I object to that.

A. ——processed this way, you can keep them for a year.

Mr. Picard: Just a second.

Mr. Fuhrman: I am going to object to the question and move to strike the answer, so far as it is in the record. I think he has called for a conclusion on the part of Mr. Paoni without laying any foundation for it. He called for whether two or three days would make any difference. I don't know and I am sure the jury doesn't know, and I don't think there is any foundation for their conclusion as yet.

Mr. Picard: This man is an expert, your Honor.

The Court: Overrule the objection.

Q. (By Mr. Picard): Now you can answer it. Start all over again. You remember my question?

A. No.

(Question read back by Reporter.)

Q. (By Mr. Picard): Did you want to go on with that or does [45] that complete it?

A. That's right.

Mr. Picard: I think the foundation has been laid.

(Testimony of Amadeo Paoni.)

The Court: Now, what do you want, to offer this in evidence?

Mr. Picard: Yes, as illustrative of the witness' testimony.

The Court: Because it is obvious that these are not part of the shipment.

Mr. Picard: No, your Honor. Illustrative of his testimony in conjunction with his testimony that they are the same as the olives that were shipped.

The Court: All right. Let them be admitted for that purpose.

The Clerk: Defendant's Exhibit A introduced and filed into evidence.

(Whereupon jar of oil-coated olives was received in evidence and marked Defendant's Exhibit A.)

The Court: Do you want the jury to look at them?

Mr. Fuhrman: Mr. Picard asked that they be——

Mr. Picard: Yes, if they will take them and pass them along.

(Whereupon Defendant's Exhibit A was examined by the jurors.)

The Court: You want them to take the cover off that? Did you want the cover removed so that they could look at it? [46]

Mr. Picard: Yes, I would like to have the cover removed, your Honor.

(Testimony of Amadeo Paoni.)

Now, if your Honor please, I would like to have the cover put on so the jury can tip the jar and see how the liquid forms.

The Court: I think you can take it for granted. Maybe I can hold it up to them so that they can see it.

(Court demonstrating with Exhibit A, turning jar upside down with cover on.)

Everybody see that?

Mr. Picard: That is all at this time.

Mr. Fuhrman: I have a few more questions.

Redirect Examination

By Mr. Fuhrman:

Q. Mr. Paoni, if you don't put olive oil on these olives, they will tend to shrivel up, won't they?

A. They are shriveled already.

Q. What is that?

A. They are already shriveled, when we take them out of the brine.

Q. Right. When you put olive oil on them, it takes some of the shriveling out, doesn't it?

A. No, sir.

Q. It does not. What instructions do you send with these olives regarding tipping the [47] barrels?

A. Will you repeat that?

Q. What instructions do you send with the Mission olives regarding turning the barrel?

A. We don't send any instructions because they know.

(Testimony of Amadeo Paoni.)

Q. They know. They know they have to be turned, and if they don't turn the oil doesn't get on the olives, does it?

A. If it isn't turned, the top gets dry.

Q. How often should they be turned?

A. Well, once a week, once every two weeks. It doesn't make much difference.

Q. You don't have to turn olives in brine, do you? A. No, sir.

Mr. Fuhrman: That's all.

Recross-Examination

By Mr. Picard:

Q. Mr. Paoni, one more question, if these olives that are here in question, the Mission ripe olives were not coated and preserved in olive oil, would they become moldy?

A. They dry and become moldy.

Mr. Picard: That is all.

(Witness excused.)

E. J. SWANSON

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name to the Court and to the [48] jury.

A. E. J. Swanson.

Direct Examination

By Mr. Fuhrman:

Q. What is your occupation, Mr. Swanson?

A. I am chief traveling inspector for Trans-Continental Freight Bureau.

(Testimony of E. J. Swanson.)

Q. What is the Trans-Continental Freight Bureau?

A. Well, we are a bureau that conducts investigations to determine the classification and rates of commodities shipped by freight to permit the proper assessment of freight charges.

Q. Is that bureau set up by all of the railroads in the United States?

A. There are several bureaus covering the entire United States. This one just covers six western states, but we serve all of the carriers in this area.

Q. How long have you been so employed?

A. Oh, about 15 years.

Q. Would you state in some detail what the type of work that you do encompasses, Mr. Swanson?

A. You mean the bureau or just myself?

Q. Yourself.

A. Well, I supervise all of the field forces and then I conduct express investigations wherever our regular representative has not been able to develop the necessary information.

Q. And what is the view that you have in mind when you conduct [49] these investigations, what is your purpose?

A. Well, to determine the correct description of the commodity to permit the carrier to assess correct freight charges in line with the tariff provisions.

Q. Now directing your attention to the copies of bill of ladings that I mentioned this morning. Did

(Testimony of E. J. Swanson.)

you hear me this morning mention them here in the court room? A. Yes, I did.

Q. Have you heard me mention the description "oil-coated, oil-cured olives"? A. Yes, sir.

Q. In that connection, is there anything at all in the tariffs, Mr. Swanson, requiring a certain kind of a description of a commodity?

A. Well, that is provided in Rule 2 of the freight classification. That is the basis on which we operate. Rule 2 provides that bill of ladings' description should conform to the provisions of freight classification and paragraph 2 of that rule reserves the right to carriers to conduct investigations to determine the proper description.

Mr. Fuhrman: I have to apologize to the Court. I think I passed out the wrong exhibit—and the jury, too.

Mr. Picard: I didn't hear what counsel just said.

The Court: He said he made a mistake in handing out the wrong exhibit. [50]

Mr. Picard: When you talk away from me, I can't hear you.

Q. (By Mr. Fuhrman): Continue, Mr. Swanson.

A. This rule 2—on page 132—this is a sheet from the consolidated freight classification. Section 1 provides that descriptions of articles in shipping orders and bill of ladings should conform to classification or tariff descriptions, and—"Section 2. Carriers reserve the right to inspect shipments

(Testimony of E. J. Swanson.)

where necessary to determine lawful ratings. When found to be incorrectly described freight charges must be collected according to proper description."

Mr. Fuhrman: I offer in evidence, your Honor, copy of Consolidated Freight Classification No. 17, Rule 2, which I have given copies to counsel and the witness. The exhibit is of the title page and the rule itself. Just the title page and the rule itself.

The Court: Who makes this rule?

Mr. Fuhrman: This rule is a part of the tariff—well, excuse me. Go ahead, Mr. Swanson, and testify. Where do you find this rule?

A. This is in the Consolidated Freight classification. These are the rules and regulations drawn up by the Interstate Commerce Commission.

The Court: Is it a rule of the Interstate Commerce Commission? [51] A. That is true.

Mr. Fuhrman: The witness said it was.

The Witness: That is true, yes.

The Court: All right. Well, I don't think we need to admit a rule of the Interstate Commerce Commission in evidence. We will take judicial notice of it—couldn't we, the same as we would any other statute?

Mr. Fuhrman: If your Honor please——

The Court: You wish it in evidence?

Mr. Fuhrman: Well, maybe the jury might want to refer to it. I don't think the jury would have anything to do with it—that is the province of the Court, telling the jury what the law is——

(Testimony of E. J. Swanson.)

The Court: Let it be deemed to be part of the record in the case.

Mr. Fuhrman: All right.

Q. In your work with the Trans-Continental Freight Bureau, did you at any time make a visit to the plant of the West Coast Products Corporation? A. Yes, I did, in April, 1949.

Q. And did you at that time inspect and talk to people concerning the manner in which these black Mission ripe olives were being packed?

A. Yes. I talked to a Mr. Krackov. I don't know just what his title or his position was. I assumed he was plant manager. [52]

Q. He was working there in the plant of the defendant? A. Yes.

Q. What were you advised as to the manner of preparing, packing of these olives?

A. Well, he told me they used various means of salt applications to cure the olives and then, as stated before, why, they are oil-coated and then placed in the kegs.

Q. In the manner in which—similar to which Mr. Paoni testified?

A. That's right. I saw the olives in the kegs at that time.

Q. As a result of your investigations, did you report your findings to the railroad?

A. Yes. I reported my findings to my office, who in turn transmitted it to the accounting department of the carrier involved.

Q. (Handing document to witness): Mr. Swan-

(Testimony of E. J. Swanson.)

son, I have just passed out four sheets of paper stapled together.

May I have it marked for identification?

The Court: Yes, mark it for identification.

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Whereupon document entitled "Trans-Continental Freight Bureau, Eastbound Tariff No. 3-S" page 87 there, page 412 thereof, and page 546 thereof, marked Plaintiff's Exhibit No. 1 for identification.) [53]

Q. (By Mr. Fuhrman): Would you tell us what that is, Mr. Swanson?

A. Well, it is the title page and a portion of Trans-Continental Freight Bureau Tariff No. 3-S, which contains the rates provided for various commodities moving from the Pacific Coast points to eastern territory.

Q. And does this Plaintiff's Exhibit 1 for identification contain description of—strike that—contain the two descriptions which are in controversy in this case? A. It does.

Q. Where is the description "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic" fall in this exhibit?

A. Well, that is in connection with canned goods.

Q. That is a canned goods description?

A. Yes.

Q. And where does the description "Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails" fall?

(Testimony of E. J. Swanson.)

A. Well, that is an item specifically providing for olives, nothing else, and has to do with salt-cured olives not preserved in liquid.

Q. That is item what—5670? A. 5670.

Q. The other was item 125? [54] A. 125.

Mr. Fuhrman: I offer Exhibit 1 marked for identification in evidence.

The Court: All right. Admitted.

The Clerk: Defendant's Exhibit 1 admitted and filed into evidence.

(Whereupon Exhibit 1 marked for identification, previously described, was received in evidence as Plaintiff's Exhibit 1.)

Q. (By Mr. Fuhrman): Mr. Swanson, in the report which you sent in as a result of checking at the office of the West Coast Products Corporation, what did you say about these olives?

Mr. Picard: Object to that, if your Honor please, on the ground it calls for the conclusion of this witness.

The Court: Yes.

Mr. Picard: That is the very question to be determined here.

The Court: Sustained. The case has to be established or fall on the physical facts as to these olives, not what anybody says about them.

Q. (By Mr. Fuhrman): Did you find, Mr. Swanson, as a result of your investigation that the olives were packed substantiailly—I am speaking of

(Testimony of E. J. Swanson.)

the Mission olives now as Mr. Paoni testified to this morning——

A. Yes, just in that manner. [55]

Mr. Fuhrman: That is all.

The Court: Any questions?

Mr. Picard: Just a few questions.

Cross-Examination

By Mr. Picard:

Q. Mr. Swanson, there have been handed to you here what has been offered as Plaintiff's Exhibit No. 1 for identification, four pages. The first one is the title page of Trans-Continental Freight Bureau East-Bound Tariff No. 3-S. The next page that is handed is page 87. Nothing between there. Nothing between there and page 87. The part where you read is headed above "List of articles taking rates provided for canned goods, pickles and preserves in items making specific reference hereto."

And you come down to the words "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

There is no question that says olives, is there?

A. No.

Q. All right. Now from page 87 you have nothing in between here till you get to page 412, have you? A. That's right.

Q. All right. Now on page 412 you have again a heading "Canned goods, pickles, preserves and other articles as designated"—and I don't see anything that is used here that is on that page. [56]

(Testimony of E. J. Swanson.)

Now then, you skip again from page 412 to page 546 and under "General commodity rates" apparently you have a large number of different items on this page, you have a number 5670 which says, "Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails," and then you have "orange meal," you have "ore," you have various others, but you haven't anything in between there, have you?

Mr. Fuhrman: Those are different items that you have referred to.

Mr. Picard: Possibly they are different items.

Q. In these pages that are here, the only two designations of olives that you have are "Olives, canned or preserved in juice or in syrup or in liquid other than alcoholic," and "Olives, salt-cured, not preserved in liquid," isn't that so?

A. That is true.

Mr. Picard: That is all.

(Witness excused.)

The Court: It looks to me that the question involved, so far, is very simple, a question whether these olives were preserved in liquid or not. That is all there is to the case, I don't know whether we will have to keep the jury very long, or whether you will put on any more testimony or not.

Mr. Picard: If that is the plaintiff's case, I would be ready to make a motion now, your Honor.

The Court: Did you have any more? [57]

Mr. Fuhrman: I may have one more witness after lunch.

The Court (To the jury): I have kept you here pretty long, and we have had a lot of interruptions. I think the jury is entitled to a lunch period now.

We will resume at two o'clock, members of the jury. Please come back at two o'clock, and don't discuss the case among yourselves as yet or form or express any opinion on it until we finally decide it this afternoon.

Please return at two o'clock.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [58]

Monday, May 11, 1953, at 2:00 o'Clock

The Clerk: Southern Pacific Company versus West Coast Products Corporation, on trial.

(The following proceedings were had within the presence of the jury.)

Mr. Fuhrman: I would like to call Mr. Herman Rempel.

HERMAN REMPEL

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name to the Court and to the jury?

A. Herman G. Rempel.

Direct Examination

By Mr. Fuhrman:

Q. Mr. Rempel, where do you live?

A. In Fresno, California.

Q. What is your business and occupation?

A. I am a chemist and food technologist.

Q. By whom are you employed?

A. Twining Laboratories, Fresno.

Q. What is your position with that company?

A. I am the chief chemist.

Q. Mr. Rempel, in your work do you belong to any scientific or professional organizations?

A. Yes, I do. I am a member of the American Chemical Society, [59] of the American Oil Chemists Society, member of the Institute of Food Technologists.

Q. Are you a chemical engineer within the State of California?

A. I am a registered chemical engineer.

Q. How long have you lived in Fresno?

A. For nearly 25 years.

Mr. Picard: What? I didn't hear that question.

Mr. Fuhrman: I asked how long he lived in Fresno. He said for nearly 25 years.

Q. As a food technologist, Mr. Rempel, are you

(Testimony of Herman Rempel.)

familiar with the processing of olives, food products? A. Yes, I am.

Q. In your work for the past few years have you worked with various types of processing of olives?

A. Yes, I have. I made very many analysises of olives and different products of the olive industry.

Q. You heard Mr. Paoni testify this morning concerning the Mission ripe olives in this case; did you hear his testimony? A. Yes, sir, I did.

Q. What do you call that kind of an olive?

Mr. Picard: Object to that, if your Honor please, upon the ground that the question involves not what you call olives but whether they are preserved in juice or liquid other than alcoholic, not with regard to what their names may be.

Q. (By Mr. Fuhrman): Is that type of olive, does it have a [60] trade name of any kind in the trade? A. Yes.

Mr. Picard: Same objection.

The Court: Well, I don't see any harm in that question. It may not have any—it may be preliminary of generally descriptive without being harmful in any way. I will overrule the objection.

A. They are generally referred to as Greek style olives, but sometimes they are called salt-cured and sometimes they are called oil-cured.

Q. (By Mr. Fuhrman): What study of olives have you made over the years? What have you done with olives?

(Testimony of Herman Rempel.)

A. Well, I have worked on the different products, the olives themselves, and I have been called in on various problems in connection with the processing of olives.

Q. Who have called you in, Mr. Rempel? Name some of the organizations.

A. Well, Pacific Oil Company, in Visalia; Oberti and Sons, Madera; and California Olive Oil Manufacturing Company, in Fresno; Lopopolo Olive Oil in Fresno.

Q. And are you familiar with the various processes that are used in the preparation of olives for market? A. Yes, I am.

Q. Will you describe them?

A. Well, most olives now are being canned. They are called [61] a ripe olive—canned ripe olive. A majority of the olives are processed in that manner.

Q. And what other methods are there?

A. There are also the Spanish type, which are green olives, which are also preserved in brine. Then the third one is salt-cured Greek style olives. And the fourth one, of which very little is being processed in California, is the Sicilian type, which is also processed in brine.

Q. In which category of the four that you have mentioned as to processing, do the olives that Mr. Paoni testified to, the Mission olives, fall in?

A. That is the one that is not processed in brine. It is the one that is processed in rock salt and it is referred to as the salt-cured or Greek style olive.

(Testimony of Herman Rempel.)

Q. When you use the words "salt-cured," what do you mean by curing, cured? What does that mean?

A. That means that the olives are preserved or kept from spoilage by a certain process and by salt-curing is meant that the salt is absorbed by the olive to such an extent that bacterial decomposition or fermentation with mold cannot take place.

Q. Is salt used as a curing agent with other foods, too? A. Yes, it is.

Q. You heard Mr. Paoni this morning testify that the salt is used to take the moisture out of the olives. Assuming that to [62] be the fact, once the moisture has been taken out of the olives by the salt and the olives are put in a barrel and after having been sprinkled with this oil, is there any other liquid that can come out of the olive into the barrel?

A. Most of the moisture will be drawn out by the salt until the moisture is reduced only 17 or 20 per cent, so that no more moisture can be drawn from the olives.

Q. So that any moisture that would be in the barrel, is it fair to say, would be the result of something that was left on the olives as a result of washing them before packing them?

A. That's right. It would be any free moisture which remains on the surface of the olives or some of the olive oil, excess olive oil, which may drain from the olives.

Q. When olives are cured by salt, as Mr. Paoni

(Testimony of Herman Rempel.)

testified to this morning, what is the process that happens to the olive itself, what goes on?

A. Well, it is a process of osmosis. There is strong salt solution in the outside. In other words, the rock salt will absorb a little bit of the moisture and it will be a very strong solution on the surface of the olive, and the inside of the olive will be water. So osmosis takes place. The water comes out and the salt goes in. The salt finally penetrates all the way to the pit and in that manner preserves the edible portion of the olive, all the way from the skin to the pit.

Q. Well, when those olives are washed at the end of the [63] processing procedure, does that salt that is in the olive come out of it or not?

A. No, only what little bit may adhere to the surface.

I have analyzed olives, Greek style olives, which had been washed and some that had not been washed, and the difference in the salt content is very small, only about half of one per cent out of eight to twelve per cent.

Q. Well, are olives cured with olive oil as a curing agent?

A. Well, olive oil alone will not cure olives. But after they have been salt-cured, then olive oil will help to inhibit mold growth on the surface of the olives.

Q. If you were to take a ripe olive off the tree, then not to do anything to it at all but simply coat it with olive oil, what would happen to that olive?

(Testimony of Herman Rempel.)

A. It would eventually spoil. Bacterial decomposition would set in and the olive would spoil.

Q. And comparing that to the olive that had a salt-curing beforehand, which one will last the longer?

A. The salt-cured olive contains enought salt to preserve it and to inhibit the growth of bacteria or bacterial decomposition of the olive itself.

Q. Considering a barrel of olives in brine, Mr. Rempel, and a barrel of olives packed, like Greek style olives are in this case, which barrel will have the most olives in it—strike that. [64]

If you have the same size barrels, which barrel would weigh the most, one that has the olives in brine or the one that has the olives packed, as Mr. Paoni testified to this morning?

Mr. Picard: I object to that as incompetent, irrelevant and immaterial. There is no question of that kind here.

The Court: Well, what are you getting at, there is some reason for the distinction in rate?

Mr. Fuhrman: Yes.

The Court: If you had a barrel the same size, one barrel of olives in brine and the other not, which one would be the heaviest, is that what you are saying?

Mr. Fuhrman: Yes.

The Court: Well——

Mr. Picard: Your Honor, I don't think that would make any difference because they limit the

(Testimony of Herman Rempel.)

cargo to 60,000 pounds, anyway, and 60,000 pounds of feathers would weigh as much as 60,000 pounds of lead. So whether there was a couple of more barrels or not wouldn't make any difference. There is that limit, anyhow.

The Court: I am inclined to think that the question as to the reason for the regulation is not a question of fact, is it?

Mr. Fuhrman: Very well. I just thought I would go into the difference, the reasons why there were two rates. [65] Actually——

The Court: We have to take it, there is some good reason that is the rate, and that is it.

Mr. Fuhrman: All right. I won't go into it.

Q. Does olive oil on olives, Mr. Rempel, do anything to their appearance?

Mr. Picard: I couldn't get that question.

(Question read back by reporter.)

A It gives the olives an attractive protective glossy appearance.

Q. (By Mr. Fuhrman): From your experience with olives, Mr. Rempel, would you say that a barrel of olives which had in it olive oil only one fourth of the way up from the bottom would be considered to be packed in olive oil?

The Court: In what?

Mr. Fuhrman: Olive oil.

Mr. Picard: I object on the ground it calls for the conclusion of the witness, on the ground it is the very matter before the Court to be decided, not within the chemist's knowledge.

(Testimony of Herman Rempel.)

The Court: I didn't get the word there.

Mr. Fuhrman: Packed in olive oil.

Mr. Picard: That isn't the question here at all, your Honor.

The Court: I will sustain the objection. [66]

Q. (By Mr. Fuhrman): Would you consider that such a——

Is the objection sustained upon the fact that it goes to the ultimate issue?

The Court: What has that got to do—there is nothing in this case as to what it is packed in.

Q. (By Mr. Fuhrman): Would you consider the olives in that—strike that. I will repeat the question.

Mr. Rempel, with your experience with olives would you consider a barrel of olives in which the liquid, whether it was olive oil or anything else, only went 25 per cent of the way up from the bottom of the barrel, would you consider the olives within that barrel to be packed in liquid?

Mr. Picard: Object to that, if your Honor please.

Mr. Fuhrman: Let me finish the question.

Q. ——preserved in liquid?

Mr. Picard: I object on the ground it is not an expert question. It is not a question for the chemist to determine. That is the very question to be determined here.

The Court: The chemist may testify about, but, of course, this call for his conclusion on the question here for decision.

(Testimony of Herman Rempel.)

Mr. Fuhrman: That's right, it does, your Honor, I submit that that——

The Court: Well, I am inclined to hold against you on that. The witness has already testified as to the process. He has already explained what the process is, that the olive is [67] cured by salt process and that afterwards when this oil is put on it that it helps to preserve the outside of the olive from——

The Witness: Molds.

The Court: That was his testimony. So I think that any conclusion from that is a matter of law. And hence were the witness to answer your question, it would be an answer to a question of law.

Q. (By Mr. Fuhrman): Are you familiar with the methods used to preserve foodstuffs?

A. Yes, I am.

Mr. Picard: Food what?

Mr. Fuhrman: Foodstuffs.

A. There are many different methods.

Q. From your knowledge of packing foodstuffs, how would you go about preserving something in liquid?

Mr. Picard: I will object to that, if your Honor please, upon the ground that that question is too general. We are dealing with one substance here, not all kinds of foodstuffis.

The Court: I am inclined to think that question is too broad.

Q. (By Mr. Fuhrman): If you want to preserve olives in liquid, Mr. Rempel, if you were

(Testimony of Herman Rempel.)

called upon by an olive manufacturer or I should say processor and asked how to preserve olives in liquid, what would your answer be?

Mr. Piccard: I will object to that, if your Honor please, [68] upon the ground that that is not the question here. The question is whether this particular kind of olive was preserved in juice or syrup or liquid other than alcoholic. Now there might be a hundred different ways to do it. We are not interested in that. We are only interested in this one type of olive, your Honor.

The Court: I think counsel is right. That is the only question in this case, whether these particular olives—and he has already answered your questions about that.

Mr. Fuhrman: Very well. I won't pursue that farther.

The Court: Anything else of the witness?

Mr. Fuhrman: No. I think that is all.

The Court: Mr. Picard, do you have any questions?

Mr. Picard: Just a couple of questions, your Honor. That is all.

Cross-Examination

By Mr. Picard:

Q. I show you a jar of olives and I will ask you if these are not what are called olives, salt-cured, not preserved in liquid?

A. Yes, these are—have the appearance of salt-

(Testimony of Herman Rempel.)

cured olives, to which the oil has not yet been applied. In other words, they have not been oil-coated.

Mr. Picard: I will ask this be marked in evidence as Defendant's next exhibit and I would like to have it displayed [69] to the jury.

The Court: Very well.

The Clerk: Defendant's Exhibit B introduced and filed into evidence.

(Thereupon jar of olives, not oil-coated, was received in evidence and marked Defendant's Exhibit B.)

Mr. Picard: That is all.

Redirect Examination

By Mr. Fuhrman:

Q. Mr. Rempel, I want to direct your attention again to Defendant's Exhibit B. Do you consider those olives preserved as they are now?

Mr. Picard: I couldn't hear you.

Mr. Fuhrman: I asked him if he considered these olives to be preserved, as they are salt-cured.

A. Yes, they are.

Q. In your opinion, what would the addition of olive oil do for these olives?

A. It would give them a glossy appearance.

(Testimony of Herman Rempel.)

Recross-Examination

By Mr. Picard:

Q. In addition to giving them a glossy appearance, it would preserve them, would it not?

A. Well, the olives would keep very nicely just the way they are. But if they should be washed off, there would be a [70] tendency for mold to grow on them. And in that case, if they were washed, the oil would help to inhibit the mold growth on the surface.

Q. That is, if you washed the salt off so that they weren't salty, washed them, then you would the olive oil on them for the purpose of preserving them, wouldn't you?

A. You can't wash the salt out of the olives because the salt is inside the edible portion.

Q. You could wash the salt off the top of them, the outside of them by washing them?

A. Yes.

Q. And then if you did that, you would put the olive oil on them to preserve them, wouldn't you?

A. Well, it wouldn't preserve them, the olive oil alone would not do it. The olives underneath would have to be preserved with salt first. But it would help to keep the mold growth off.

Mr. Picard: That is all.

A. Because mold does not flourish well in oil medium. It has to grow where moisture is present.

The Court: If you took these olives off the trees,

(Testimony of Herman Rempel.)

you couldn't just pack them in a barrel with olive oil, could you? A. No, they would not keep.

The Court: They would not keep. So the process of preserving them in a more or less—more or less permanently is accomplished by the salt [71] processing?

A. That's right. The salt goes into the edible portion. It replaces the water and preserves the olive. It is not subject to bacteria fermentation and mold.

The Court: Anything else you gentlemen want to ask?

Mr. Picard: That is all.

Mr. Fuhrman: That is all.

(Witness excused.)

Mr. Fuhrman: At this time I would like to have the Court take judicial notice of a definition of the word "in" as found in Webster's New International Dictionary, Second Edition, 1944. The word "in":

"Primarily, 'in' denotes situation or position with respect to a surrounding, encompassment or enclosure, denoted by the governed word.

"2. Indicating relation to a whole which includes the parts spoken of; as, the tallest boy in the class, one in a thousand; with respect to material means or constituents, as a statue in marble.

"Used predicatively or post-positively indicating a position of encompassment, enclosure, etc.; specifically (a) enclosed or contained."

The Court: What you are saying is argument.

Mr. Fuhrman: Sir? [72]

The Court: That is argument: It is not——

Mr. Fuhrman: I am just giving a definition.

The Court: I don't think that is anything a jury can take judicial notice of unless the Court instructs them. I don't see any harm in your reading the definition of the word 'in,'' but I don't think it is any evidentiary matter that the jury can do any more than pay attention to as an argument by counsel.

Mr. Fuhrman: Very well.

The Court: Is there anything else you have to present?

Mr. Fuhrman: I have one further matter, your Honor.

To clear up technically something that went on this morning regarding the one tariff as to classification, technically to clear the matter, but I would like to clear it up by Mr. Swanson.

E. J. SWANSON

recalled as a witness on behalf of the plaintiff:

Redirect Examination

By Mr. Fuhrman:

Q. Regarding the two sheets from the Consolidated Freight classification No. 17 in Rule 2, his Honor asked whether or not that was the statute of Interstate Commerce Commission, and I believe it was indicated to the Court and to the jury that it was a statute, but I find since that it is not a

(Testimony of E. J. Swanson.)

statute. But if you will tell us exactly what [73] it is, Mr. Swanson.

A. Well, it is a carriers' regulation, rule regulation that has been made mandatory through action of the Interstate Commerce Commission. That is actually what it is.

Q. Does the carrier file that with the Interstate Commerce Commission?

A. The carrier files that with the Interstate Commerce Commission and then it becomes binding on the shipper and the carrier.

Q. And are copies published of that document for the benefit of the shipping public?

The Court: Well, this is just what is ordinarily known as a tariff.

Mr. Fuhrman: That is correct.

The Court: They are required by the statute to be filed by the Interstate Commerce Commission and the shipper and the carrier is bound by it.

Mr. Fuhrman: That is correct.

That is the only matter I want to clear.

Mr. Fuhrman: I will offer that as an exhibit.

The Court: I will hold this a matter of law that that is so. I don't think we need to have it marked as an exhibit in evidence.

Mr. Fuhrman: All right, your Honor.

(Witness excused.) [74]

Mr. Fuhrman: Your Honor, before the plaintiff closes its case, do you want to hear the matter of jurisdiction?

The Court: I don't think so. I found the cases directly in point on the matter. But that need not be taken up in the presence of the jury.

The plaintiff rests, does it?

Mr. Fuhrman: The plaintiff rests, your Honor.

The Court: Did you want to make a motion? I will excuse the jury for a few minutes.

Members of the jury, we will have a legal matter to hear, so you can go out.

(The following proceedings were had outside the presence of the jury.)

Mr. Picard: If your Honor please, I move the jury be instructed to render a verdict in favor of the defendant upon the ground that the plaintiff has failed to prove the allegations of its complaint. That in order that the plaintiff recover in this action, it would be necessary to show that the olives here in question came under the item 5670 of the tariff, which provides for "olives, salt-cured, not preserved on liquid," and that the plaintiff has failed to prove that they come within that item, but the evidence here affirmatively shows that they do come within the item 3800 which provides for olives preserved in juice or liquid, whose juice or syrup or liquid?—other than alcoholic. All of the testimony here [75] shows that, first of all, the olives were preserved in olive oil, a liquid. Their own witness testified that that preserved them from mold and, furthermore, that there was a quantity which would be about from one quarter to one third

of a keg full of the liquid which, upon it being turned and moved, covered the entire contents of the barrel. So they have not only shown that it does not come within the higher tariff but affirmatively have shown that it comes within the lower tariff and therefore I ask that the jury be instructed to render a verdict for the defendant.

The Court: Well, counsel, I take it that there is no evidence that you are going to introduce that is going to be contrary to the testimony given by Mr. Paoni, is there?

Mr. Picard: No. I have witnesses to confirm that, to confirm this method of shipping olives, to show that for 25 years or more these olives made in this manner, processed in this manner, have been shipped and charged for under the lower tariff; that persons who are familiar with it know that these are not what you call Sicilian olives but are a different type (if we are going to go by name), and that they are, as your Honor could observe by looking at the exhibits—there is a liquid in them, a liquid forms in them, and they are preserved in liquid.

The Court: That is the question involved in the case, but as I sat here and listened to the testimony as it has been [76] given by the man in charge, Mr. Paoni, it seems to me that we have been unduly keeping the jury here. There is no question of fact involved in the case at all. It is a question of whether or not, according to the process which undisputedly was used, because the plaintiff has put that testimony on himself or itself, is whether or

nor these olives were canned or preserved in juice or in syrup or a liquid other than alcoholic. Now that is the only question involved in the case, and the method by which it is done is not in dispute.

Mr. Fuhrman: I submit it is a matter of law.

The Court: Under those circumstances it is not only a question for the jury, but according to decisions under the statute, that is the duty of the Court to decide which tariff should apply.

Mr. Fuhrman: For that reason, I move for a directed verdict in favor of the plaintiff.

The Court: I think the whole matter could have saved time—time could have been saved in this case by just a stipulation as to the facts and then a determination as to whether or not which tariff should apply. I don't see any question of fact in it.

If you will look at the case of Bernstein Pipe & Machinery Co. against the Denver and Rio Grande Railroad Company—I don't know whether counsel has that case or not—it is a recent decision of the Tenth Circuit Court of Appeals, December, [77] 1951—this identical question was—not with respect to olives, but with respect to two classifications of material—and the question was which classification should apply, and the Court also held in that case that the United States District Court has jurisdiction irrespective of the amount involved and goes on to point out that where there is no occasion for the exercise of any administrative discretion that it has to be performed as to the turning and meaning of the words of the tariffs which are used in

their ordinary sense and to apply that meaning to the undisputed facts. And that is all that is presented to this court.

Here is something that is undisputed, the method by which the olives were packed and prepared. That is undisputed. The testimony the plaintiff has put on is the testimony of the man in charge. I am not even interested in the testimony of any experts. I don't see that would have anything to do with it. It is a question of whether or not on the undisputed facts to apply the meaning of the tariff. It is purely a question of law. I don't see what a jury could decide in that case. There is some room for dispute and I think counsel should argue it more fully, as to the meaning of this tariff provision as to whether or not these olives were canned or preserved in juice or in syrup or liquid other than alcoholic, as disclosed by the facts.

I would like to have more argument on that question before [78] I would want to decide it, but I don't see that there is any point of wasting the time of the jury here. It is a comparatively simple matter now and it may not be simple in solution, because no problem is simple in solution. But what the problem is simply, here we have olives packed in—which were treated and packed in a certain way. Now, were those particular olives under one tariff or under the other? That is a question of law. I would have to hold this is not a jury question, unless you were going to dispute the testimony of your own manager.

Mr. Picard: No, I don't intend to dispute that.

The Court: You might as well face the fact right square in the eye. I suppose your client said, well, we want to have a jury because we want our fellow citizens to decide whether the railroad company is being arbitrary with us, we want twelve ordinary people to decide this matter. And I can just imagine him telling you that, Mr. Picard, and, of course, you have to be guided by what your clients want. But there is no emotionalism that can be involved in this. You can't appeal to the emotions, the feelings of the jury with somebody that hasn't got a leg cut off here, you can't dwell at great length on this suffering the person has undergone. It isn't that kind of a matter. It is a pure matter of law, and I don't see any escape from that fact. I think we would profit much more judicially in the case if you will present arguments as against the background of the facts. We have the question of the application [79] of these tariffs.

Mr. Picard: Did your Honor think it would make any difference if the railroads had accepted shipment of that type of olive for 25 years?

The Court: That might be a matter of argument, too. I don't know. I would be inclined to think that—and this is only offhand because I have been involved in some of these Interstate Commerce Commission cases—in fact, quite a few of them—I am inclined to think offhand, unless there are some decisions that I don't know about, which is quite possible, that it wouldn't make any difference at all what the railroad did in the past, that they have to enforce the tariffs, and even if they have—I had

a case that went to the Court of Appeals. It involved a demurrage question, some years ago.

Mr. Fuhrman: Western Pacific?

The Court: A Western Pacific case, in which there was some question of that kind, as to whether or not that was the way the railroad company had acted in the past. I held that it didn't but the Circuit Court reversed in that case. But I think it was more on the ground that there was an affirmative act that created almost an act of God that prevented the enforcement of the regulation. But it seems that it is quite clear that the railroad company can't vary the tariff. It just can't do it if it did it for 50 years——

Mr. Fuhrman: There is no stopping it. [80]

The Court: It doesn't make any difference. It could have charged the lower rate for 25 years and then somebody would come up and stick a pin in them, woke them up to the fact that they had charged a wrong rate, why, they would have to go ahead and charge the other rate. And there is no such thing as an estoppel that was disposed of by it.

Mr. Fuhrman: The Bing case——

The Court: The famous—the original famous statute that prohibited rebates. That was all considered and disposed of in that act. So I don't think it would make any difference, unless there is some special matter that you have in mind that you looked into.

Mr. Picard: I didn't think that the theory of the estoppel was applicable. What I had in mind, there

were decisions where if there are two tariffs applicable or where the article could possibly come within the definition of two different tariffs, that the shipper is entitled to it.

The Court: Wouldn't that equally be a question of law? The tariffs themselves say where they are subject—where the facts show that the commodity is subject to two tariffs that the lower is the applicable one. Isn't that right? Isn't there some such ruling as that?

Mr. Fuhrman: That is the general policy. The general line of cases hold to that effect.

The Court: Again you have the question of [81] law as to whether or not the commodity is, analyzing the language properly, whether or not it is ambiguous to the extent that the commodity might be governed by two tariffs——

Mr. Picard: Then what I had in mind was that being the principle, if they had for 25 years uniformly applied the lower tariff, it would indicate rather clearly that was their own——

The Court: In the ordinary lawsuit the rule of law that you are speaking of—in the absence of the jury—In other words, the practical interpretation of parties put on the contract. I remember a very famous case in California that is often quoted Melone versus Ruffino—I think it is 150 California —I used it quite frequently—in which they quoted Lord Coke's rule: You tell me what the parties have done under the contract and I will tell you what they meant by the contract.

That is what you are referring to?

Mr. Picard: Yes.

The Court: That rule of law is—there is no question about it, it is not applicable to matters of tariff, because there the railroad company can't interpret the tariff. It has to apply the tariff the way it is filed. That is all there is to it. If there is a dispute about it, then it has to be settled by the Interstate Commerce Commission and by the Court, not in accordance with what the parties may [82] have interpreted but the way it is interpretable as a matter of law.

Mr. Picard: There was an application of the rule somewhat like it by one of your Honor's predecessors on this bench. When he was in the District Court of Appeals, Judge Kerrigan in an unlawful detainer action where they claimed that the description of the property was not clear and it was the same description in the lease, and he said if it was sufficiently clear for them to find their way in they could likewise find their way out.

The Court: That is good law.

What do you suggest, Mr. Picard? There is no use in keeping the jury here unless you think that there is some purpose, something that I haven't considered, and the evidence will be just the same—won't it?

Mr. Picard: The evidence will be the same.

The Court: Why don't you just—may I suggest to you, why don't you submit the case on the evidence that is now in and then take your time and present your argument on the matter of the applica-

tion of the tariffs. I think that will be very much more helpful to the Court in deciding it.

Mr. Picard: Would your Honor think that anything could be accomplished, even though your Honor dismisses the jury, by my offering some evidence of the persons who have actually shipped these olives, as to the method of packing and [83] similar packing?

The Court: Would they say anything different?

Mr. Picard: No. They couldn't say anything different than Mr. Paoni did—not as to the shipment of them.

The Court: As to the preparation and shipment?

Mr. Picard: No, because that is the way the olives were prepared and shipped.

The Court: I don't see that it would add anything to it, because the test of what tariff applies is the manner in which the olives were prepared and shipped. Isn't that right?

Mr. Picard: Pardon me. I didn't mean to interrupt.

The Court: That's all right.

Mr. Picard: I also have some olives that I didn't want to offer in evidence with any of these witnesses but I had intended to offer them in evidence in the defendant's case, if it becomes necessary to present any evidence of the olives that were not preserved in liquid, that were treated as these olives were, not preserved in liquid to show that they became moldy.

The Court: Like the same type of bottle you just showed the witness.

Mr. Picard: No, your Honor. These are the type of olives which we claim come within the higher tariff. These olives, your Honor, are salt-cured, not preserved.

The Court: These are salt-cured and no oil was put in [84] them?

Mr. Picard: That's right.

Now we have some that were salt-cured or brine-cured—brine-cured rather than salt-cured—brine-cured and washed and not preserved in oil and they become moldy.

Mr. Fuhrman: I submit it isn't even relevant if they are brine-cured.

Mr. Picard: In other words to show that the oil does preserve them, your Honor. That would be my purpose in that.

The Court: Well, of course, I don't think there is any doubt that there is some, according to the testimony of the witness for the plaintiff, that there is some preservation that takes place as a result of the use of the oil because he said it preserves against the mold being formed. But, as I see it, it is not the question in the case. The question is whether or not these olives are canned or preserved in juice or in syrup or liquid other than alcoholic, which is a different question entirely.

Mr. Picard: Well, of course, "preserved" does not mean immersed, your Honor, and what they are contending for is virtually "immersed."

The Court: Well, canned or preserved in juice or in liquid or syrup other than alcoholic—that is the process by which the preservation is accom-

plished; which would not be true, would it, if there was no process of curing? [85]

Mr. Fuhrman: That's right.

The Court: However, I don't know. Offhand I think that the weight—you had a little heavier burden that the other side in that regard. But I am not —until I have heard all of the testimony—I am not so sure as to whether or not that tariff applies at all in this case. That is why I prefer to hear more argument on it, and I think that is the way to present this matter. There is no use taking up time for so showing that. That is not really—that's just fancy. It is better to get—better to spend the time and the energy on the phase of the case that is really important to the decision. I hope you don't feel that I am trying to tell you how to present your case.

Mr. Picard: Your Honor is the one to determine it.

The Court: I am not trying to tell you how to present the case. But it just seems to me that's it, and why waste time and money with it. Let's get at the discussion of that matter.

Mr. Picard: Your Honor is the one to whom it is presented and the one to determine it. So necessarily I want to present it as your Honor wishes.

The Court: I don't want your clients to feel aggrieved that I am trying to deprive them of a jury trial, but I would have to hold there is no question of fact in the case and the Court must apply the tariffs. That is a question of law. [86] There are quite a number of decisions in that regard.

Mr. Picard: In other words, your Honor does not think it is a question of fact to be determined, whether they were preserved in juice or liquid?

The Court: I think it is a question, entirely a question of law, and I would suggest to you that you submit the matter and then argue it. If after that it appears there is some matter that we have overlooked, it might make a factual difference in the matter—although I don't think it is conceivable, although I don't want you to—I don't want to induce you to get into a situation where you would be hamstringing yourself in any way—if that does appear, why, we can always open up for further consideration.

Mr. Picard: All right, your Honor.

The Court: I think that would be the sensible thing to do. And then we can either spend some more time this afternoon in argument or, if you wish to submit something in writing on it, it would be better to have it this way as well.

Would you be agreeable to doing that?

Mr. Picard: That is agreeable.

The Court: Let the record show that the matter will be submitted and the Court will discharge the jury and then we will proceed to argument and briefing in the matter, preserving to the defendant the right to reopen the case if it appears that in the interest of justice—if it appears that it is in [87] the interest of justice to do so, for the presentation of further evidence.

Bring the jury back.

(The following proceedings were had in the presence of the jury.)

The Court: Members of the jury, the Court has found that it is proper in this case for the Court to decide this matter, the case as a matter of law, and for that reason the jury won't have the benefit of eating any of these olives in this case. We won't need the services of the jury in this case any more, and I am discharging the jury at this time. I don't know when you will be needed again, but you are discharged until further notice and the jurors may be free to depart.

(The jury was thereupon discharged, and a short recess taken.)

Mr. Picard: May I be permitted to put Mr. Krackov on the stand to testify as to his practical experience with olives of this type? He has shipped them for more than 25 years.

The Court: I have no objection to that.

E. A. KRACKOV

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you please state your name?

A. E. A. Krackov. [88]

Direct Examination

By Mr. Picard:

Q. Where do you live, Mr. Krackov?

A. New York City.

Q. What is your business?

(Testimony of E. A. Krackov.)

A. I am a broker and commision agent.

Q. In what type of products?

A. Imported products, particularly olive oil and olives.

Q. And under what name do you do business?

A. Trans-Oceanic Sales Company.

Q. Where is the principal office of the Trans-Oceanic Sales Company?

A. 6 Harrison, New York City.

Q. You are also a stockholder of the defendant in this action? A. I am.

Q. Have you been engaged in the olive oil and olive business for some time? A. Yes, I have.

Q. How long? A. Oh, about 25 years.

Q. Generally will you state your experience in it?

A. I have sold all types of olives, both imported and domestic, which were substituted for the imported olives.

Q. Are you familiar with the various designations in the trade? A. I am. [89]

Q. Of olives? A. Yes.

Q. Will you tell me what generally in the trade and in your experience is considered a salt-cured olive not preserved in liquid?

A. Salt-cured olive is considered a dry olive, cured in salt and shipped dry.

Q. You are familiar with the jar of olives which is marked here as Defendant's Exhibit B?

A. Yes, these are what we call dry salt-cured olives.

(Testimony of E. A. Krackov.)

Q. Not preserved in liquid?

A. Not preserved in liquid and shipped dry.

Q. And how are they shipped?

A. Usually in cases, in wooden cases, and not in barrels.

Q. Or kegs? A. Or kegs.

Q. Is that an edible olive as it is?

A. Why, certainly. These are what we sometimes call tree-ripened or baked olives that we used to import and that we have been substituting in this country in a small degree.

Q. You heard one of the witnesses here refer to what he called Greek-style olives? A. Yes.

Q. Do you know what a Greek-style olive is?

A. Certainly. [90]

Q. What is a Greek-style olive?

A. Greek-style olive is a black olive preserved and shipped in brine and not in salt.

Q. I show you what is here as Defendant's A in evidence and I will ask you if the olives that are found in that jar are what are called Greek-style olives?

A. No, these are not Greek-style olives. These are oil-cured olives.

Q. Will you state the distinction between those and the Greek-style olives?

A. Greek-style olives are cured and packed in brine, and oil-cured olives are salt-cured at the beginning. The salt is completely eliminated and then it is packed and preserved in olive oil.

(Testimony of E. A. Krackov.)

Mr. Fuhrman: May I have that answer?

A. And the juice——

(Answer read back by reporter.)

A. And the juice of the olive.

The Court: Well, you couldn't eliminate the salt from inside the olive?

A. The salt is not in the inside, your Honor.

The Court: It must get in.

A. It penetrates it.

The Court: You mean the olive?

A. It penetrates the—the salt, after it is in solution, [91] penetrates the meat of the olive.

The Court: It must have a curing effect. They wouldn't go through with the business of curing it if the salt didn't have a curative effect.

A. The curative effect in the instance of the oil-cured olive is to dry the olive partially by extracting part of the water, that is naturally in the olive. But our intention is never to extract all of the water because that does not give you an oil-cured olive in the sense that it is sold as in the trade.

Q. (By Mr. Picard): In other words, is that the distinction between this shriveled-up appearance——

A. That is the distinction between the salt-cured dry olive and the oil-cured olive.

Q. In other words, when all the salt is removed—when all the salt is removed and salt-cured, does it get that dried-up appearance which is in the jar which is here as Defendant's Exhibit B?

(Testimony of E. A. Krackov.)

A. You mean in the instance of the oil-cured olive?

Q. No. In the instance of the salt-cured olive, not preserved in brine, in liquid.

A. The salt-cured olive not preserved in liquid, the olive is permitted to get dry, almost bone dry, and it is sold as such.

Q. And in the olive which you described as an oil-coated olive—— [92]

A. We don't allow it to get bone dry because it becomes a different olive when it is bone dry.

Q. You are familiar with the processes used by the defendant here? A. I am.

Q. And what is the condition of that olive before the olive oil is placed on it?

A. The moisture of the olive is extracted but not in its entirety. I would say we leave about half of the moisture in the olive.

Q. Then what is the effect of the olive oil on it?

A. To preserve the olive against mold, because if we didn't the olive would get moldy.

Q. And have you seen the barrels after they are opened, after they are shipped?

A. Why certainly.

Q. And what is their condition as to whether they are preserved in liquid when they are opened?

A. When the olives are preserved in the oil, olive oil or juice of the olive?

Q. Yes. A. They are fresh and edible.

Q. Are they similar in appearance to the jar which you have in your hand, which is here as De-

(Testimony of E. A. Krackov.)

fendant's Exhibit A? Let me finish the question before you answer it, please, so that the [93] reporter can get the answer at the end.

Mr. Fuhrman: Objected to as incompetent, irrelevant and immaterial, not a fair statement of the evidence in this case.

(Question read back by reporter.)

The Court: I don't see—that has already been testified to by the witness. I will overrule the objection.

A. They are.

Q. (By Mr. Picard): Now, Mr. Krackov, in the trade and in your experience with selling olives and with the shipment of olives and your general experience in the olive business as a whole, does preserved in liquid necessarily mean immersed in liquid? A. No, not at all.

Q. Will you tell me, as far as weight is concerned, what is the difference in weight between the type of olives which are here, salt-cured, not preserved in liquid, as in Defendant's Exhibit B, and the type of olives as in Defendant's Exhibit A?

Mr. Fuhrman: I am going to object to that question on the grounds it is incompetent, irrelevant and immaterial.

The Court: Well, I sustained a similar objection of your opponent on that same ground. I will sustain the objection. I don't see that——

Mr. Picard: The only reason I said that, if your Honor please, notwithstanding you had sustained

(Testimony of E. A. Krackov.)

that objection, when your Honor was making your offhand remarks—— [94]

The Court: I sustained your objection on that very question.

Mr. Picard: But after your Honor sustained my objection you said there might be some question here as to a differential by reason of weight. That is the reason I asked the question. Does your Honor remember your statement to that effect?

The Court: I asked counsel what—I supposed that had something to do with the reason for the statute, for the distinction in tariffs as based on a similar circumstance.

Mr. Picard: Because of your Honor's remark——

The Court: I will sustain the objection.

Mr. Picard: I think it is obvious, if your Honor please, by looking at them there is a difference in weight, anyway. I thought possibly your Honor had in mind that that had something to do with it by your Honor having asked that question, having made that remark, that your Honor thought possibly that had something to do with a different tariff.

The Court: Anything else?

Mr. Picard: Yes, your Honor.

Q. Now, Mr. Krackov, you say you had been about 25 years, 25 years' experience in shipping olives similar to the type which are in the jar marked as Defendant's Exhibit A?

A. I have, yes.

Q. What rate has the railroad company charged

(Testimony of E. A. Krackov.)

for that type of olive, the higher rate or the lower rate? [95]

Mr. Fuhrman: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Picard: I think that is all.

The Court: Let me ask you, Mr. Krackov, going to the grocery store or the delicatessen store and buying a bottle of olives, either black or green, they are in a bottle and there is a liquid in them, water, I think it is, nothing more——

A. Brine, your Honor.

Q. Is that brine?

A. Yes, it is a light brine.

Q. Very light brine? A. Yes.

Q. That does have some brine in it?

A. Oh, yes, it has to have brine.

Q. That isn't true in the case of the canned olive?

A. The canned olive has a light brine too. Ten per cent solution.

May I say something, your Honor?

Mr. Picard: Better not. Is it an answer to the Court's question?

A. In connection with the Court's question. It might be interesting for the Court to note that these oil-cured olives are now being packed in New York in jars from our kegs right at the stores for sale off the shelf in their same state that [96] we ship them into New York.

Q. (By Mr. Picard): If you go into a store—

(Testimony of E. A. Krackov.)

take the Court's question—and ask for salt-cured olives that are not packed in liquid, similar to the ones that are here in the jar, Defendant's Exhibit B. How would you get those?

Mr. Fuhrman: I object to that qeustion. I object to the question the way it is phrased.

The Court: I suppose you would get them the way you asked for them. I would think you would get them in a bag. They are just dry.

A. That's right.

Mr. Picard: That is what I——

A. You would take them out of the case. Dispense them out of the case. Whereas——

The Court: This is all very interesting but it still doesn't answer the question we have in the case.

Mr. Picard: I thought it was helpful.

The Court: Any other questions of the witness?

Mr. Fuhrman: I have some questions.

Cross-Examination

By Mr. Fuhrman:

Q. Mr. Krackov, you have been in the olive business for a long time, have you not?

A. Yes, sir.

Q. And I assume in the course of your work you have come in [97] contact with the standards put out by the United States Department of Agriculture for olives? A. I have.

Q. I will show you a document here and I will ask you if you have ever seen that before.

(Testimony of E. A. Krackov.)

Mr. Picard: May I see what you are showing him?

Mr. Fuhrman: Certainly (showing counsel).

A. Yes, I have seen this before.

Q. What is it entitled? What is the title of the document? A. The title?

Q. Yes.

A. "Tentative United States Standards for Grades of Salt-Cured Oil-Coated Olives."

Q. I want to direct your attention to the asterisk after the title and ask you to read at the bottom there what it says. A. May I amplify——

Q. Mr. Krackov——

A. You want me to read that first?

Q. Yes. A. May I comment as I read it?

Q. Read it first in its entirety.

A. In fairness to the Court I think the Court ought to know all the facts concerning——

Q. Just a minute.

The Court: The trouble with witnesses who want to argue [98] the case, they don't help the case. Just answer the question. All I am interested in is getting the facts from the witness.

A. (Reading):

> "*This product is variously referred to in the trade as 'Greek olives,' 'Greek-style olives' or 'oil-cured olives.' "

Q. (By Mr. Fuhrman): So that according to this bulletin, Greek-style and oil-cured olives and Greek olives are similar products, are they not?

(Testimony of E. A. Krackov.)

A. As the bulletin states, it is tentative standards. They didn't know themselves what they were going to be called.

Q. I am asking you what is in the bulletin.

A. Yes.

Q. Now I have got another question I want to ask you. What is the definition for salt-cured oil-coated olives given at the top of the document?

A. "Salt-cured oil-coated olives are properly matured olives which have been cured by contact with crushed rock salt and after proper curing have been coated with olive oil."

Mr. Fuhrman: I would like to offer this in evidence as an exhibit on behalf of the plaintiff.

Mr. Picard: I will object to it, if your Honor please, upon the ground that is is not a standard. It is merely called "Tentative United States Standards" and further, it does [99] not meet the question which is here before your Honor. That question——

The Court: I don't think that you can make this as an argument to me. The definition is given by the United States Department of Agriculture, but I don't think that it is evidentiary in any way.

Mr. Fuhrman: Well, it is—it might be to this extent. The witness testified that Greek-style olives, oil-cured olives, were two different kind of olives.

The Court: I don't think that that is—I don't attach any weight to that. That isn't of importance, either, in the case, because the facts show these are

(Testimony of E. A. Krackov.)

salt-cured oil-coated olives. There is no question about it. There is no dispute about it. The process —let's not get down to that yet.

Is there anything else you want to ask?

Mr. Fuhrman: Has your Honor ruled on my offer of this document?

The Court: Mark it for identification. I will sustain the objection.

The Clerk: Plaintiff's Exhibit 2 marked for identification.

> (Thereupon document entitled "Tentative United States Standards for Grades of Salt-Cured Oil-Coated Olives, Effective November 25, 1940," was marked Plaintiff's Exhibit No. 2 for identification.) [100]

The Court: The testimony of this witness is only informative as to the custom and the practice in dealing in the olives—in the olive industry. Anything that he may have to say on the question of the interpretation of the tariffs is purely argumentative.

Mr. Fuhrman: I have no further questions.

(Witness excused.)

The Court: Are you going to argue the matter now?

Mr. Picard: I would like to argue a little.

Mr. Fuhrman: May I have one moment while I talk to my expert witness? In view of the testimony of Mr. Krackov, I don't know whether your Honor attaches any importance to it or not.

The Court: Well, personally, I don't mean to be sarcastic about it, but I don't think this is a question for experts, because we have here a factual description of what is done and we have the language of the tariffs. Now an expert might say one way or the other about it. The only effect of that would be that he is interpreting the tariff.

Mr. Fuhrman: Very well, your Honor.

The Court: I don't see—I don't attach any significance to that. As I see the case now—I will hear the arguments. The factual issue is simple. The testimony without dispute shows that these olives were salt-cured. The process by which they were salt-cured was described. They were then coated with [101] oil and put in barrels and shipped. There is no dispute about that.

Now the question is whether or not these were canned or preserved in juice or in syrup or in liquid other than alcoholic, that would call for their being given a freight rate under that tariff classification. This is the case.

I think I fairly stated it. I perhaps may have over-simplified it, but that is what it is.

Mr. Picard: That is what I thought it was from the start. That is what I stated the first thing this morning.

Who did your Honor want to open the argument?

Mr. Fuhrman: The plaintiff?

The Court: The case is all submitted?

Mr. Picard: I had made a motion. On that motion I should open the argument.

The Court: The case is all submitted?

Mr. Picard: Yes.

The Court: In its entirety.

(Defendant rests.)

The Court: The plaintiff should take the laboring oar.

(Arguments in summation.)

Mr. Fuhrman: Your Honor has stated, I think, that the reference to the plain simple words of the tariff will guide the way to the decision of this case. The rate that the defendant is contending for here is canned goods rate as found [102] in the tariff under "Canned Goods." Striking out the words that are not particularly pertinent, that provision, item 3800, which is found on page 2 of the exhibit near the bottom, third line from the bottom, reads:

"Olives, preserved in liquid."

That is the whole point. Later on in the tariff there is a more specific item, 5670, which reads as follows:

"Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails."

Now there is no question in this case as to the fact that these olives are salt-cured. Mr. Paoni has clearly indicated that in his testimony. The very important word in both tariffs is the word "in."

These olives are washed in fresh water when they come out of the salt. They are placed upon a table. Now bearing in mind the salt process in the first place is used to remove water from the olive and that the washing process is a quick one and just

washes off the olives, the only liquid that is in the barrel when the thing is finally packed is that which comes from the addition of the olive oil to the olives, and what little might remain on the olive as a result of the washing process.

Now your Honor has, I am sure, gone into the store and purchased stuffed olives or olives for Martinis or olives of that nature that are in a glass. That glass is full of a liquid, [103] which the witness Krackov has testified is brine. When you open a jar, and you want to get an olive, you go down into the liquid, you pull the olive out with a fork or some kind of an instrument. The liquid is there; it fills the glass. You can see it. I submit that the defendant's own exhibit in this case shows the paucity and the infinitesimal amount of liquid that is in this jar as compared to the olive, the green olive, that is in brine.

Now Mr. Paoni himself testified that he packs green olives and when he packs green olives he packs them in brine, and it is the same brine that those olives have been in since the beginning of the preservative process.

The Court (Examining an exhibit): This has got a little sour odor to it. Maybe it has been exposed or something. I don't know. I am just wondering if there was any possibility of any—no, it's just oil. It may have got a bit rancid. (Sampling an olive from the exhibit.)

Mr. Fuhrman: Mr. Paoni told us this morning when he packed his olives in brine, the green olives, the barrel is full of brine. The olives are covered

with brine. They are in the brine. The tariff uses the word "in." It does not say "near" the liquid or "by" the liquid. It says "in" the liquid.

Your Honor is familiar with rules, the interpretation that should be used in their regular sense. As I quoted for the jury and your Honor earlier today from Webster's New International [104] Dictionary, Second Edition, it says that "in" primarily denotes a situation or position with respect to a surrounding encompassment or enclosure, denoted by the governed word.

Counsel for the defendant would have us believe that a film of limited duration will accomplish the same result as a bottle full of liquid, as a green olive and the olives in the liquid. I submit first off that they are mechanically entirely different situations. The olive in the brine, which is the canned olive, as Mr. Krackov testified to, is in the brine. The jar is full of brine or the container, the barrel, is glass. Here we have the barrel only 25 per cent full, at the most, with the liquid. There is a film on it when he puts them in there. Suppose you took the barrel of olives packed in brine and the barrel of olives packed, as are the ripe olives in this case, set them side by side on a shelf and left them there, what would happen? The olives in the brine, your Honor, would continue to be preserved in the brine. Nothing has to be done to them because they are encompassed by the liquid. They are in it. The other olives, as the witnesses testified to here today, have to be manipulated in order to retain any of the film upon it. The film runs off the olives. If these olives

are packed in the manner in which Mr. Paoni says they are packed, are left alone, it would drain off and mold will form. Therefore, as he testified and told us today, the barrels have to be turned. [105]

The Court: Apparently the oil does adhere to some extent to the olives.

Mr. Fuhrman: It does, to some extent, certainly, but it does not adhere to a sufficient extent so that you could leave a barrel of olives without turning it, as you can a barrel of olives in brine.

The Court: I think the question turns more on the meaning of the word "preserved" than it does on the word "in."

Mr. Fuhrman: I am coming to that, too.

The Court: Because you might have a liquid being used to coat the product with that would adhere to it and would have preserved the qualities without necessarily having complete immersion of every bit of olive.

Mr. Fuhrman: Well, coming to the matter of the word—use of the word "preserved," I think it is clear from the testimony that the main preservative in the case of all olives, whether they are Mission ripe olives, whether they are green olives, whatever they are, it is the salt. Salt is the universal preservative that has been used for ages for anything, almost any foodstuffs that you can think of. It is in the salt, the olive is, for a long period of time, from three weeks to five weeks.

The Court: What you are really talking about here is that the tariff classification is intended to

cover two different commodities, one exclusive of the other? [106]

Mr. Fuhrman: Yes, your Honor.

The Court: When you are talking about olives that are salt-cured, you mean by that only olives that are salt-cured and that the technique of preservation is only salt-cured. Whereas, when you are speaking under the section of canned goods and preservation, you are talking about there something that in which it is preserving technically, consists of a procedure in juice or liquid non-alcoholic in form or syrup which constitutes the process of preservation?

Mr. Fuhrman: Well, to a certain extent——

The Court: I think that is what——

Mr. Fuhrman: I will agree with that, except salt in both cases is the preservative.

The Court: No, you could have olives that would come under the classification of the tariff on page 87, couldn't you, if they were just olives that were preserved in juice or in syrup or liquid other than alcoholic and they wouldn't have to have anything else and they would come under that classification, wouldn't they?

Mr. Fuhrman: Yes, they could.

The Court: I mean, under the terms of the classification, that is where they fall.

Mr. Fuhrman: Under the terms of the classification.

The Court: Maybe it wouldn't do any good.

Mr. Fuhrman: Unless the preservative—unless the juice or [107] syrup was a brine, that's correct.

The Court: But suppose they took a lot of olives and they picked them off the trees and they stuck them in the syrup that had just olive oil in it and didn't have any brine in it at all, they might not turn out to be any good, they probably wouldn't, and according to what the witnesses have said, but they would still come under that classification of the tariff, wouldn't they?

Mr. Fuhrman: Yes, they could be canned in Coca Cola and still come under the classification as it reads, that is correct, your Honor, provided that it was a preservative.

The Court: Provided it was a preservative.

Mr. Fuhrman: In other words, the liquid, it has to—in my interpretation of it, is that it has to be in it and it must be a preservative.

The Court: Must be preserved by the liquid.

Mr. Fuhrman: Yes, in this case, in the technical sense, and you have to consider the trade usage. The preservative of an olive is the salt. True, the olive oil does tend to prevent mold and does so prevent mold. But the basic deterrent to bacteria disintegration of the olive——

The Court: According to your theory of it, then, this classification that is on page 87 could only, practically speaking, the only commodity that would be shipped pursuant to that would be olives shipped in brine? [108]

Mr. Fuhrman: For a practical matter, yes, your Honor, I would think so, because unless you had brine you couldn't be shipping them—according to the standards and the understanding of the business,

you couldn't ship them in any other juice or liquid or syrup than brine in order to preserve them.

The Court: If you didn't go through any other process.

Mr. Fuhrman: That's right, because that is all that has been testified to as being used in the trade as a preservative for olives of this nature, that is brine.

The Court: When you get to the other classification, the olives there are cured by salt, then they rub oil on them, and while that oil might not be entirely the preservative element, if it had some preservative element or effect to it would it have to be the entire act of preservation in order to bring it within that tariff?

Mr. Fuhrman: If I understand your Honor, do you mean are we contending that——

The Court: Well, suppose the process of preservation consisted in part of the salt process and in part of applying olive oil at the time of shipment to the olives which had been salt cured. I am talking now about the preservation technique.

Mr. Fuhrman: You have got salt-cured anyway.

The Court: But there is nothing in the tariff on page 87 that says the canned or preserved olive in juice or in liquid or in syrup could not also be salt-cured. [109]

Mr. Fuhrman: That's right. It could be salt cured. I agree. And then you have to determine what do the words "preserved in liquid" mean.

The Court: You think that in order to meet that tariff then, that you have a salt-cured olive, you are

going to preserve it in liquid form, you have got to immerse it in a liquid that will have preservative qualities to it before it can get this classification?

Mr. Fuhrman: I think so, your Honor.

The Court: You don't think that the coating with olive oil would, and putting it in the barrel, would, even though it has a preservative quality, would meet the requirement of the tariff as to preserved in liquid?

Mr. Fuhrman: No, I don't think that film of oil as liquid in the first place, from a strictly mechanical sense, and in the trade usage as well. When you consider a film of oil alongside of an olive packed in a container full of brine, then you must consider both usages and both instances. If you consider a can of peaches, the peaches are packed within something. They are in the juice. Ordinarily when you can fruit—I don't know how familiar your Honor is with canned fruit—there is a liquid used in the canning. The object that is canned is contained within the juice. Here it is not, particularly when you compare the two methods of canning olives. I do not believe it is reasonable. [110]

The Court: It really comes down then to, according to your argument, as to whether or not preservation under the tariff, what preservation in liquid means. You say it is the quantity of liquid that determines whether or not——

Mr. Fuhrman: In a way, yes, that is correct. The liquid must be a preservative and from the trade usage it must cover the item. If you say "pre-

served in the liquid" it would seem to me to imply that the item must be encompassed by a liquid.

The Court: I suppose that the difference in the tariffs is occasioned by the fact that if you don't pack them in liquid you get more olives shipped.

Mr. Fuhrman: You do.

The Court: Is there more value to the shipment?

Mr. Fuhrman: It is heavier than the other way.

The Court: In other words, if you have a whole barrel of olives, and they are floating around in liquid, you haven't got so many olives.

Mr. Fuhrman: Yes.

The Court: And in that event you haven't got as valuable a commodity in the trade and the freight would be more.

Mr. Fuhrman: If you follow—excuse me, your Honor.

The Court: That's all right.

Mr. Fuhrman: If you follow the line of reasoning of Mr. Picard, where do you draw the line as to how much liquid is enough: one inch out of 23, two inches; would you say a 32nd of [111] an inch is preserved in liquid; would you say a 64th of an inch is preserved in liquid, or is 12 inches? Where do you draw the line? I say from a practical point of view you have to first consider trade usage and the various methods of packing the same product, and you don't have to look very far to find an item that falls clearly under the olives.

The Court: There is another angle to it, too, isn't there? Not only the quantity of what constitutes the liquid but what constitutes preservation?

Mr. Fuhrman: That is true. You have the true elements, preservation and——

The Court: If they are talking in the tariffs about preservation in the sense of entirely preserving the olive, then you have got one thing. If they are talking about preserving the outside of it from mold, if that could be preservation in the tariff sense, then they would be entitled to get the lower rate. I think that by and large you have to take the common sense meaning of these two tariffs to see what distinction they were really trying to draw.

Mr. Fuhrman: I agree. You have to be very practical about it in the extent of the distinction they were trying to draw in the tariff.

I think that about concludes the position of the plaintiff, your Honor.

With one further remark, I will conclude. I would like to [112] direct your Honor's attention to the cases that have been before the Court in this last year entitled Southern Pacific Company versus Nicolo Musco, 29577. That case was substantially the same as this. The end result of the processing was that you had an olive that was processed and full of salt. Mr. Musco thereafter covered them with oil. I don't know whether he used as much oil as the defendant did here or not. In any event, he used a quantity of oil with which he coated the olives and put them in cans. The same issue was before the Court and in that case Judge Roche granted judgment for the plaintiff Southern Pacific Company.

The Court: Did Judge Roche write any memorandum on the case, do you know?

Mr. Fuhrman: Your Honor, could I explain that case? I tried that case before Judge Roche, and in explanation of it I should like to say that the issue was substantially identical with that before the Court in this case. But the testimony in that case was this, the olives were processed by placing them in a heavy brine solution. The defense was that this heavy brine solution contained salt, penetrating to the pit of the olive until the olive had become fully cured. The olives were then removed from the brine solution, placed on a table, coated with olive oil, and then placed in barrels, and shipped in that fashion. No additional liquid being placed in them. [113]

In this case, if you understand and recall, we had a situation where the olives were processed by placing them between alternate layers of salt. So the end result, your Honor, was the same.

The Court: That is, there was a salt-curing method but a different salt-curing method in one case than in the other?

Mr. Fuhrman: That's correct, your Honor.

The Court: Then the olives were placed on the table, covered with oil and packed in barrels?

Mr. Fuhrman: That's right. In that case, as it developed, there was an issue, one as to whether they were salt-cured olives, and, secondly, as to whether they were preserved in liquid. The testimony was heard by Judge Roche, there was no jury, and he resolved the issues in favor of the plaintiff, and his conclusion was in effect that the olives as a matter of fact—as a matter of fact, there was a finding of

fact that the olives were salt-cured and that they were not preserved in liquid.

I feel somewhat handicapped in referring to that case, your Honor, because if I had prepared the findings of fact a little differently, why, there would have been a clear cut comparison. I would be glad to show you the findings of fact and we would have the identical situation. But in preparing the findings of fact I just recited the ultimate facts of the case, that is, that the olives were salt-cured and not—— [114]

The Court: That is agreed in this case, there is no dispute about the fact that the olives were salt-cured and then covered with oil and put in the barrel.

Mr. Fuhrman: Yes. It was Judge Roche's conclusion that they were not preserved in liquid and that the higher rate was properly applied to the shipments.

The Court: That is a decision of this court. Have you examined the record?

Mr. Picard: Part of it, your Honor, not all.

The Court: It is pretty hard to determine whether or not the situation would be binding without having any more precise record.

Mr. Fuhrman: Findings of fact and conclusions of law——

The Court: It wouldn't be binding res judicata but it would be, if it were a decision by the Court on the same question of law, it would be binding on the other judges.

Mr. Fuhrman: Yes.

I might say, your Honor, it was for that reason that a motion for summary judgment was made in this case, and, as Mr. Picard pointed out earlier today, the motion was heard before Judge Roche, and it is my recollection and understanding that he denied the motion on the ground that he thought there was a different factual set-up in this case because of the different method of processing, and that was the only point upon which, as I understand it, the motion was denied. [115]

The Court: When was the decision before Judge Roche in the other case?

Mr. Fuhrman: Approximately a year and a half ago.

The Court: I notice this is an old case. It was filed in 1950. Here we are, three years having gone by.

Mr. Fuhrman: I can explain that, your Honor. As I told you, we had a number of cases to file when this matter developed and I expected that the trial of one case would result in the issue being determined and we selected the Musco case and we tried that to a successful conclusion, and it took some time to bring that case on for trial. As a matter of fact, all of these cases were brought just within the applicable period of limitations, which is two years running from the date of delivery. And after the case did come on for trial before Judge Roche, negotiations were entered into with the defendant in this case and it was ultimately agreed by the defendant that he would resist the action.

The Court: What is happening now in the years that have gone by since? Are these still——

Mr. Fuhrman: The same tariff is in effect today. My understanding is that very few, if any, of these olives this type of olive, is being shipped at the present time. The shipper's contention is that the rate is too high for them. Recently negotiations were entered into with the railroad traffic department for the purpose of obtaining a lower rate, [116] which would suit the needs of these shippers on the Pacific Coast. It may be that some of these shippers are making shipment by water. I am not sure about that.

That concludes our case, your Honor. We will be glad to furnish a copy of the findings of fact and conclusions of law that Judge Roche handed down.

Mr. Picard: Primarily, as I understand it, even if the facts were the same, the judgment of Judge Roche would not be binding upon your Honor. If it had gone up on appeal and determined by the Court of Appeals, that would be a different matter. But, as I understand it, the determination of one judge of equal rank and standing would not be determinative upon another, particularly on a matter in which there may be a question of fact. Furthermore, the motion for summary judgment, which was made by the plaintiff in this action, was heard before Judge Roche and it was argued quite thoroughly and the facts that have been developed here were developed before Judge Roche by affidavit, and Judge Roche ruled that the facts were

different and therefore that his decision was not applicable.

The Court: The facts are different, if they are, of course the decision wouldn't be binding.

Mr. Picard: Not in any manner, and also, for whatever it may be worth, which I think would have just as much value, another similar case was filed in the Superior Court at [117] Woodland, and it was there determined in favor of the defendant and against the plaintiff Southern Pacific Company. Now if it was that company, or if it was not that company, it was some other.

Mr. Fuhrman: The Erie Railroad.

Mr. Picard: The Erie case. The same principles and everything else applicable to it. So, I think the matter really is before your Honor as a matter of first instance as far as this case is concerned.

Now I don't want to take up too much of your Honor's time. The hour is late already. My adversary took up a good deal of your Honor's time, but I do want to go into this a little because I think the argument that was made here is not very sound. First of all, I think their interpretation of this tariff is very wrong. I should think they would know better, if I am not mistaken—I don't want to accuse them of deliberately deceiving the Court, but it seems to me the matter has been presented to your Honor in such a way that it is not entirely fair. They have spoken of this only as being for canned goods. Now let us look on page 87 of the few pages they have given us here. It says "List of articles taking rates provided for 'canned goods,

pickles and preserves' in items making specific reference hereto."

Now take the next words: "Canned goods, pickles, preserves, in glass, earthenware or metal cans boxed, in [118] pails or tubs crated, or in bulk in barrels, except as otherwise provided."

Now, how can they contend that this means only "canned" when it deliberately says "in bulk, in barrels," and then it goes down and it uses the specific word "olives," your Honor—"olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

But if there could be any question whatever, if your Honor please, we come to the item upon which they place their great reliance here, on page 546, the third of the pages that they have, and we come to this heading of "Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails. Less carloads or in straight carloads."

Now let's go a little further down than that, your Honor, and it says: "Also mixed carloads of the following commodity with one or more of the following commodities"——

Mr. Fuhrman: Just a minute. Mixed carloads of the foregoing commodity"——

Mr. Picard: Isn't that what I said?

Mr. Fuhrman: No, you said "following."

Mr. Picard: Well, that is my mistake.

"Mixed carloads of the foregoing commodity with one or more of the following commodities." I thought that is what I said but maybe I didn't. All right. Now, the following commodities—take [119]

the last one and you have the exact words which appear in 3800:

> "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

So your Honor can see that this whole thing absolutely applies to olives. It applies to the type of olives that are here in question and it isn't that this is a specific tariff which applies to olives and the other applies only to canned goods, because the other specifically says "in barrels" and here if you ship them in that same manner, in the same carload, with olives salt-cured, not preserved in liquid, the whole carload then gets the higher rate, according to this tariff.

So it is very clear, if your Honor please, that the two tariffs that are before your Honor and the only matter for your Honor to determine is which of the two tariffs is applicable. It is not a question of where this other applies only to canned goods and preserves, and I can't understand how an argument could be made——

Mr. Fuhrman: That isn't the contention, counsel.

Mr. Picard: All right. Now I have prepared some instructions for the jury, if your Honor please, and the first one I have is a definition of "preserve" which I made as a combination from the definition appearing in Webster's New International Dictionary and Funk and Wagnall's New Standard Dictionary. The word "preserve" is defined to mean to save from decomposition by curing

or treating with a preservative; [120] to save from decay; to prepare so as to resist decomposition or change, as to preserve fruit, or to save or keep from decay or corruption by means of some preservative; to keep in a sound state, as to preserve fruit.

And that, I submit, if your Honor please, is exactly what is before your Honor.

Now counsel has argued this matter and, with all due respect to your Honor, your Honor seems to have fallen into the idea that it is necessary for us to prove that we come within item 3800. I submit, if your Honor please, that the tariff which was charged by the plaintiff here was under 3800 and that the burden is upon the plaintiff to prove that it comes within 5670. And, furthermore, that if there is any question as to which of the descriptions is appropriate, even if the two descriptions are equally appropriate, the shipper is entitled to the lower rate.

I have authorities on both of those points, if your Honor desires them; the case of Sonken-Galamba Corporation versus Union Pacific Railroad Company, 145 Federal Second 808, holds that the plaintiff having accepted the shipment in question as of the character specified under item 3800 of its tariff and having assessed—I wouldn't say that that case covers the same thing.

I am reading now from the manner in which I put it—it might not cover ourselves, but similarly to it—under Section [121] 3800 of its tariff and having assessed and collected the transportation

charges based upon the rate specified for that classification, the burden is upon the plaintiff to show that at the time the olives were shipped they were of a character which called for a higher freight rate.

And even if we concede that the olives in question were included in more than one tariff designation, the defendant was entitled to select the designation which was the more specific, and that is held in United States versus Gulf Refining Company, 268 U.S. 542, and the DeRamus versus Mengel Company, 74 Federal Supplement 425——

Mr. Fuhrman: May I interrupt and ask if that case concerned olives? You were quoting, I thought, from a case, and you mentioned the word "olives."

Mr. Picard: Well, I am quoting from my own argument on it that I made before. I won't say specifically that that case does cover olives but I say that the language of it and the principle in that case is similar to this and I have simply used olives here because olives is the commodity here in question, without saying that those cases specifically covered olives. I don't contend that they did. I am simply giving the similarity here, your Honor.

And where the tariff descriptions are equally appropriate, the shipper is entitled to the lower rate, and that is held in American Railway Express Company versus Price Bros, 54 Federal [122] Second 67.

Also, your Honor is familiar with the authorities to the effect that the carrier's intention or construc-

tion is not what is applicable here. That ordinary language is to be applied.

So what we come to here, if your Honor please, is simply this, that in order that the plaintiff can prevail in their action it is necessary for the plaintiff to prove to your Honor by a preponderance of the evidence that the olives which were shipped here were salt-cured and not preserved in liquid.

Now, I take it, if your Honor please, that it cannot be fairly or reasonably contended that "preserved" means "preserved, immersed," The olives here were, as the testimony shows, for a certain length of time cured in salt. That had the effect of taking some of the moisture out of it but it did not take all of the moisture out of it. It took part of the moisture out, a certain percentage of the moisture. That was the purpose of it. And then after that was done, the olives were cleaned and washed; as nearly as it is possible the salt was taken out—at least from the exterior of the olive—without interfering with the effective work that may have been done by the salt on the interior. The olives were then put on a table, manipulated and a quantity of olive oil put on them, and they were all olive oil coated, and the testimony is, and there is no contradiction because the plaintiff's own experts said that that was done, to preserve the [123] olives; thereby, if your Honor please, the olives were preserved in liquid. They were then put in kegs, and the testimony is uncontradicted—there has been nobody here that has contradicted it otherwise, we have from the testimony, from the defend-

ant, the man who processed them, packed them and shipped them, and the man in New York received them and saw them after they were shipped in New York, and there was there in a 16 inch keg about, we will say, six inches of liquid—in other words, almost one third—more than one quarter. Mr. Panoi testified from one quarter to one third of the liquid. Now that liquid was in there for the purpose of preserving the olives and keeping them from getting moldy, and Mr. Paoni testified that if they had not been coated in olive oil so the liquid arose by a combination of the juice or moisture which came out of the olives themselves plus the olive oil, they would have become moldy, and, as he says, you shook or moved the barrel or turned the barrel so that the liquid which was in there would get on all of the olives and keep all of the olives moist and keep them from decaying.

Now, if that isn't preserving them in a liquid and if the purpose of that liquid is not preservation, I don't know what it could be.

I think, your Honor, obviously the tariff applies to the second jar of olives which we furnished here. The olives which were salt-cured and then shipped dry, not preserved in [124] liquid. And I think, if your Honor please——

The Court: You think that the tariff would apply to those?

Mr. Picard: The tariff would apply to the second type of olive, and that is all that it would apply to.

The Court: And it would not apply to these?

Mr. Picard: Would not apply to those.

The Court: Referring to Defendant's Exhibit A.

Mr. Picard: The lower rate of tariff applies to those which your Honor has in your hand. The higher tariff applies to these. They are a dry olive.

The Court: What would you say would be the reason for making that distinction?

Mr. Picard: We go back again, I take, to the fact that these olives, dry like they are, are very light. They are very light in weight and therefore you could probably send twice as many olives like this for the same weight that you could send a single quantity of those olives. Those olives are moist.

The Court: Don't you think there are as many olives in this jar as there are in that jar, in number of olives?

Mr. Picard: In number, yes, but in weight, no. In other words, that is a weight comparatively heavy—I don't know the theory—I didn't make the regulation, your Honor.

The Court: I would think that offhand that the reason, probably the reason for the distinction is that you have a [125] barrel of olives in brine, for example, that you are going to have less weight than if you have a barrel that is filled up entirely with olives, or would it be that way?

Mr. Picard: Well, I wouldn't think so, your Honor. I would think that the brine or the water possibly might be heavier than the olives.

value, then, that is involved?

Mr. Picard: We are just guessing, your Honor.

The Court: It isn't weight? Maybe it is the

The Court: There must be some reason for it.

Mr. Picard: You can obviously see these, if your Honor looks—well, look at these things. Just dry. I shouldn't think they weigh much more than a piece of paper. That, if your Honor please, unquestionably is the type of olives that come within a higher designation. There can't be any question of that.

The Court: They provide that these have to be in a water-tight container, too, don't they?

Mr. Fuhrman: I ask Mr. Picard if any of those so-called dry olives are shipped from California to eastern points?

Mr. Picard: I understand that they are.

Mr. Fuhrman: I wonder if it is a fact.

Mr. Picard: If it is agreeable, I will ask Mr. Krackov.

Are those shipped?

Mr. Krackov: They were shipped and are still being [126] shipped in Delevan, California. Dry olive—the dry olive type has been imported—we import some dry olives. They are packed in wooden cartons.

The Court: Well, the olives that are packed in brine, they develop a smooth surface do they?——

Mr. Picard: I would imagine.

The Court: ——when they are preserved in brnie, I suppose they develop a smooth surface that we are accustomed to.

Mr. Krackov: Just as they come from the store, they are stored in brine, preserved that way, canned, then packed that way.

The Court: What are these, these that I am holding in my hand now, the one that has been rubbed in oil—where are those disposed of in the market?

Mr. Krackov: They are sold to the Latin trade.

The Court: They are not sold to the restaurants or to the households, are they?

Mr. Krackov: To the housewife, yes, for the Italian and Spanish. They use that type.

The Court: They are not the fancy type that are smooth?

Mr. Krackov: No.

The Court: As we ordinarily see in the shelves in the grocery store and delicatessens?

Mr. Krackov: The black ripe olive, so-called ripe olives that are canned, are not really ripe. They are processed black [127] and processed and canned and called ripe olives. Those are smooth, the green olives are smooth.

Mr. Picard: I thought, if your Honor please, that counsel made an argument which was very apt in our favor and that was he asked where do you draw the line as to liquid? I think that is exactly right. As long as they are preserved in liquid. I don't think it makes any difference whether it is six inches or eight inches or twelve inches or a barrelful, as long as they are preserved in liquid.

I will concede that possibly if there is just about one inch or two inches at the bottom of the barrel that that might not be enough to act as a fair preservative. But where, as here, you have approximately six inches out of sixteen inches or almost

half, not too far from half a barrel, so that if your barrel is rolled over you probably have it up to about here, and as you roll it all of the olives become moistened, immersed—not immersed but moistened from it, and that preserves them and therefore they are preserved in liquid.

The Court: Well, of course, technically I think that that argument might be sound. The question is interpretation of the tariff here, that is the thing that they are talking about in the tariff. Don't we have to apply what we think the railroad company and the Interstate Commerce Commission was thinking of when, according to common sense interpretation, when they were using language? Do you think when they said that canned [128] or preserved in juice or in syrup or in liquid meant in olive oil that was rubbed with—rubbed on the olives and then put in a barrel?

Mr. Picard: And then the juice coming out afterwards, your Honor, in combination with the olive oil, forming the liquid.

The Court: I think maybe in a purely technical sense that as long as there is a drop of liquid on an olive—that it is sufficient that there be a drop of liquid on each olive, that it might be said that it would be in liquid to that extent. But don't we have to interpret the statute according to some common sense standards as to some distinction that is sought to be made? Isn't the distinction that they are making the difference between olives that have been preserved—in which the preservation process has been

by salt and then they are shipped, and the so-called brine or preservation method in which you will find the fluid or the material in a barrel or a can of liquid, and syrup or syrup that acts as a general preservative of the foodstuff? Isn't that the common sense distinction that they are making?

In one case they are talking about the olives which had been cured by salt. In this case, what do they do with olives cured by salt? They rub them with some olive oil. They put them into the barrel. Yes, that is helpful, that is helpful in making them look nice. It is helpful perhaps in preventing [129] any mold to develop on the outside of them. But is it the type of preservation that the framers of the tariff were speaking of when they were talking about something that was preserved in juice or syrup or liquid, canned or preserved in the juice? They were thinking of the ordinary type of canning or preserving in liquid or in juice.

Mr. Picard: I don't think so, your Honor. Primarily I think your Honor is confusing preserved with immersed. I don't think to preserve something in liquid it is necessary to immerse it in liquid, so long as the liquid does preserve it.

The Court: The primary method was the salt. That was the primary thing. That got the olive into shape so that it could be shipped without doing anything more to it.

Mr. Picard: Oh, no, your Honor. If that were done—that is why I offered to show your Honor——

The Court: How about the dry olives? I know

that is a different process. However, it is a salt process.

Mr. Picard: The salt is not washed off those.

The Court: Whether you wash it off or not, there is a preservation method by means of the salt that enables the olive, after it has gone through that process, to be shipped thereafter without anything more being done.

Mr. Picard: And that is the only thing that comes under 5670. [130]

The Court: Now there was that method. So that the essential, primary method of preserving the olive for shipment was the salt process, because if that wasn't so then it couldn't be shipped following that. The witnesses have so testified. So the primary preservation process was that of the salt.

Now I think offhand, and that's why I said to you that you had the greater burden, what they are talking about in the tariff here is the primary preservation method that is something in liquid and that that is the process by which the preservation is accomplished. I think that is the common-sense point of view. They wouldn't have put it in two ways, one, that in which olives which are salt-cured and not preserved in liquid, in waterproof barrels, boxes, kits or pails, as referred to; and the other in which olives which were canned or preserved in juice or in syrup or liquid other than alcoholic is referred to. So that you have two separate categories. One in which the tariff is particular to say that the olives are salt-cured and not preserved in liquid, in waterproof barrels, boxes, kits or pails,

and another classification in which the olives are canned or preserved in juice or in syrup or in liquid other than alcoholic. Those categories are in common sense mutually exclusive of one another, and under those circumstances it seems to me that that is why I thought that you had the laboring oar. And I don't know what was in Judge Roche's mind in deciding the other case. I didn't even [131] know about it until it was mentioned to me today. I haven't had an opportunity to speak to him about it. But I wouldn't be surprised, having lived together in brotherliness with him so many years, maybe our minds work the same way in the matter.

Mr. Picard: First of all, if your Honor please, I revert to the distinction which I made before, that it does not say here "immersed." It merely says "Preserved."

The Court: I didn't say that.

Mr. Picard: And as counsel very aptly asked, where do you draw the line? Just so long as there is liquid there which, when you roll it around in the barrel, preserves the olives.

The Court: I think the question, counsel, is what is the primary and fundamental preservative process.

Mr. Picard: I don't think it says that.

The Court: Apparently because one excludes the other. In one case it is, the preservation process is one which when you get through with it you don't have to do anything more with it. You can ship them just that way. Whereas in the other process

you ship them and pack them when they are still in the process of being preserved by that preservation process which has salt in it and that is the distinction. It is the common-sense distinction, where we see the barrels of brine, the bottles with the liquid in them, all the cans with the liquid in them and the food in them. There the preservative process is there by virtue of the liquid that is in them as distinguished [132] from what the tariff speaks of as an olive salt-cured and not preserved in liquid.

Mr. Picard: That means a dry olive, just as that Exhibit B is, your Honor, a purely dry olive. And then furthermore, if your Honor please, the tariff, the rating having been charged——

The Court: I agree with you in a technical sense, the adding of the oil to it is a process of preservation because the testimony shows that it has got something to do with preservation. But it is not the primary process and it is not the thing that the tariff is speaking of. There I think we have got to take the common-sense point of view; as the Court said in this Pennsylvania Crushing Company case, you don't dissect that language to find out when does a boiled egg become a hard-boiled egg as distinguished from a soft-boiled egg, for example, and have a lot of scientists take the witness stand and figure out the precise point of time or degrees of temperature. But we have to look at the way that the ordinary person regards a hard-boiled egg as distinguished from a non-hard-

boiled egg, and that is the way you have to look at these tariffs, I think.

Mr. Picard: There is nothing in there that I can see, with all due respect to your Honor, to support the statement which your Honor just made. It does not say anything about the primary preservative. The one of them that I think would [133] be applicable only to the type of olives in "B," olives salt-cured not preserved in liquid, those are dry olives shipped right in the salt that they were. Now these others, if your Honor please, after they have been in the salt for a certain length of time, not as long a time as the other type, are taken out and they are washed. Now, if they were shipped at that time, your Honor, without any oil being put on them or with them—I have samples here which I offered to show to your Honor to show that they become moldy and spoil, and their own chemist admitted that——

The Court: But that would—Oh, they wouldn't necessarily be spoiled.

Mr. Picard: If they became moldy.

The Court: I don't think that I am so naive to believe that there would be a big industry that would be shipping these olives in that form.

Mr. Picard: That's right.

The Court: Knowing that they would be spoiled.

Mr. Picard: That is why they don't ship them that way, your Honor.

The Court: They do ship them that way.

Mr. Picard: That is why they do preserve them in liquid and that is why they——

The Court: But they have shipped them and they do ship them the other way. [134]

Mr. Picard: No, your Honor. Those are shipped in salt.

The Court: They are shipped without olive oil, without being in——

Mr. Picard: Not after they are washed.

The Court: I don't think that industry would, having in the past now, if the result would be that they would all be spoiled.

Mr. Picard: Not washed.

If you took these and washed them, then you couldn't ship them.

The Court: But they are still dry.

Mr. Picard: You couldn't ship them, then.

The Court: I am talking about Plaintiff's Exhibit No. 1 there. Plaintiff's Exhibit No. 1 is being shipped, has been shipped, and I say I am not so naive as to believe that people engaged in that industry would ship them that way if they would become spoiled. Maybe they would develop a— Defendant's Exhibit B is what I meant to say.

Mr. Picard: They are not washed, your Honor.

The Court: Whether they are washed or not, they are certainly not in olive oil.

Mr. Picard: No. And——

The Court: I am not going to agree that people are going to be engaged in the industry of shipping these things if they are all going to get [135] spoiled.

Mr. Picard: Of course, they wouldn't, your Honor, and that is why they preserve them in oil.

That is the very purpose, when they wash them and wash the salt from them, they preserve them in oil. If they washed them, washed the salt from them and then shipped them, they would, as your Honor stated, all become spoiled, and that is why they are preserved in oil.

The Court: Well, of course, they look better and probably are better if you put them in oil.

Mr. Picard: The chemist admitted——

The Court: The fact that they look better that way doesn't mean they necessarily come under——

Mr. Picard: If your Honor will taste them you will find—I don't think there is—I have tasted both of them. I guess maybe those salt-cured ones might be all right for some people but I couldn't even eat one. They are absolutely bitter. While that is a good-tasting olive——

The Court: I guess they probably use them for cooking.

Mr. Picard: Something like that. If your Honor tastes one, your Honor can't eat it, but you can eat the other kind.

The Court: That may also be true but still it does not mean that these all become spoiled because they haven't been put in olive oil.

Mr. Picard: If the salt were washed from them, your Honor, if the salt were washed from them and then they were [136] shipped without being in the oil, they would become moldly and then spoil. You either have got to ship them as in "B" or No. 2 with the salt on them and not wash the salt from

them or if you do you have got to put the oil on them so that the oil forms a liquid in the keg and preserves them in liquid.

Now your Honor will remember this, that the lower rate has been charged by the railroad company; that the burden of proof is therefore upon the railroad company to establish the higher rate.

Your Honor has argued this as if it were necessary for us to prove that they were within 3800.

The Court: No, I don't say that. The burden of proof is upon the plaintiff to show which tariff is applicable.

Mr. Picard: Now, your Honor——

The Court: I don't think the burden of proof means too much.

Mr. Picard: If they came within either tariff, if the language is such that they could come within either tariff, we are entitled to the lower tariff.

The Court: I think that is right.

Mr. Picard: We are still entitled to the lower rate and certainly there is a liquid preserving them and there is a liquid in the barrel. So whether they are immersed or not, if your Honor please, I submit that certainly this is not the type of dry olive which is provided for in the tariff which [137] says salt-cured, not preserved in liquid. In other words, they would have to show that they are not preserved in liquid.

Now, when the oil is used to coat them and when they are in the barrel and a liquid forms in the barrel between the juice or brine from the olive itself, plus the oil, which covers about one-third of

the barrel or more, so that it moistens them all and preserves them, certainly they are preserved in liquid.

The Court: Mr. Picard, I must confess, I don't know what the reason for these differences in tariffs is. It is a subject with which I am not familiar. It is an administrative matter. The only problem is, the question of interpreting the tariff. Now it may be that in order to get that—when the olives are covered with this oil, that the seller gets a better price for them than where the salt is not washed off them and they are shipped that way and that there is greater value to the shipment. It may be that has something to do with the tariff. I don't know, I am not familiar with that. But tariff-wise I am doubtful as to whether or not just rubbing the olives with the oil, which enables the shipper to get a better price because of the extra work and material he used in that regard, would therefore entitle him to get a lower tariff rate which he could only get if he would ship it in the way that is customary in accordance with, according to orthodox standards as being a commodity that is preserved in [138] liquid, in the sense that it is ordinarily understood.

Mr. Picard: When you follow that, your Honor, with the fact that a liquid forms between the oil and the olive itself and that the keg is then about one-third filled with that liquid, so that that liquid does preserve the entire barrel, certainly, if your Honor please, even taking your Honor's most unfavorable to us reasoning, there is the doubt there,

and if there is any doubt we are entitled to the benefit of that doubt on the interpretation of the doubt to go down to the lower rate.

The Court: I think in a strict technical sense you could take a glass of olive oil and pour it into a barrel and there would be liquid in there. But I don't think that that is the common-sense interpretation of the meaning of the tariff. I think that the meaning of the tariff is the way people ordinarily regard the shipment of merchandise preserved in liquid. That means that merchandise is in liquid in the common accepted usage of the business and the trade and as we understand it, as we see the commodity preserved in liquid. I think that is what the tariff is talking about and that it is not required that there be a technical and scientific or quantitative analysis of the amount of liquid, and not to reach a point where in one instance it wouldn't be liquid and in another instance it would be. And you could carry out the doctrine to the ludicrous, to the extent that you could put a [139] teaspoon of the stuff in the barrel and there would still be liquid in there, so that an infinitesimal amount of the liquid could get on each one of the items of merchandise in the barrel. I am not just saying that to show that I don't think the determination of the question depends upon that kind of technical analysis of quantity of liquid. I think we are talking about—we are talking about the thing we are accustomed to thinking of and what they were thinking about when they wrote the

tariff, the ordinary everyday shipment of merchandise in barrels, bottles and cans, as it is shipped in a liquid, in which it can be kept indefinitely, without more ado, in a state of preservation, as in a bottle, a can, a barrel. My grandmother used to make pickles and they were in a barrel of brine. Well, they were good in that barrel of brine for a long time. You didn't have to do anything with them. The same thing applies to the bottle of olives, the can of olives that is on the shelf in the grocery store, the barrel in which they come, in the brine. That's what we speak of. It is not intended that—I don't think they were referring to taking a brush and putting olive oil on the olive and then putting it in the barrel, and then in order to get that liquid on the olive to keep it moving around over all of the olives and that periodically you would have to roll the barrel around or do something. I don't think that is the type of preservation in liquid that these tariff makers were referring to. They are talking about [140] everyday experience of shippers. The tariff was devised by reason of the experience that they have, what kind of merchandise there was to ship, how was it shipped. From that they fixed the tariff and the rates.

Mr. Picard: Isn't your Honor carrying it to the extreme when you hold it is necessary to be immersed?

The Court: I don't say immersed. I say that if they are talking about the barrel of liquid in which the preservation exists, in which the preservation

technically proceeds while the article is in it, is encompassed by the preserving liquid.

Now, if it was put in the separate compartment, in the bottom of the barrel, if there was liquid in the barrel, it wouldn't do any good——

Mr. Picard: Wouldn't the common-sense interpretation of it be sufficient liquid to preserve, not necessarily one teaspoonful like your Honor referred to, or complete immersion, but sufficient liquid to preserve?

The Court: I don't think that the tariffs could possibly—would be subject to that interpretation because there would have to be a chemist and a surveyor that would have to examine every shipment to examine whether or not there is a certain percentage of liquid. I think what they are going by here is just the ordinary common-sense business experience.

If you would go and take a survey of the man that runs the corner grocery store in hundreds of cities in the United [141] States and/or the shipper or the buyer of merchandise that is shipped, you would find that his answer would be the answer that I just gave. They don't make any technical distinctions. They see a bottle and it has got a preservative liquid in it and the commodity is in it. They see a can likewise, a barrel, and it is the same way, and that's the sort of thing that the tariff regulations sought to reach. Now it wasn't intended that you could get by and avoid that tariff regulation by putting a gallon or a quart of liquid in

a barrel and say, well, I have got some liquid in here and that satisfies this requirement.

Mr. Picard: The railroad itself gave it that interpretation for 25 years, your Honor, the interpretation——

The Court: I don't think the railroad gave that interpretation. It probably was impractical to understand that situation. That is why it was put on the bill of lading and the railroad company never questioned it until somebody came around and said, "This isn't right." That is the way those things are done. You don't think the freight agent up in Oshkosh or some place or other is going to go down and examine every barrel to find out whether or not or how much liquid there is in the barrel and so forth to see if it is as specified in the bill of lading or something else to indicate that it is not so. They accept the shipper's designation in most cases. [142]

Mr. Picard: The very thing they interpreted—"oil-cured olives" was on the bill of lading and that has been on all the bills of lading and it is just very recently that they first raised this point. Prior to that time they always accepted it under the tariff 3800.

The Court: I feel that I have given as much time to the discussion of the matter that I can. If there is anything else you want to file in writing on the matter, I will be glad to have it. My impression is that you would have to apply common sense, ordinary, everyday interpretation of these regulations such as in conformity with ordinary

business practices, in conformity with the experience in shipping merchandise. If that is what the tariff makers had in mind, that is the standard we have to apply, and that your attempt is to apply—to get a lower rate to something that is not in conformity with ordinary usage and ordinary commonsense definition of the meaning of the language of the tariff.

Mr. Picard: I would like opportunity to look up a little further on definitions, your Honor, and see if I can find anything that is more closely—more closely covers the point than just general argument that I have made.

The Court: Suppose within five days you submit some additional memorandum that you would like to file, and counsel have an opportunity to reply to that in five days.

Mr. Picard: Ten days instead of five? [143]

The Court: Very well. Ten days, and ten days to reply.

(Thereupon it was ordered the matter be submitted on memos, ten days and ten days—June 2, 1953, for submission.)

[Endorsed]: Filed September 30, 1953. [143-A]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE OF TRANSFER

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, to wit:

Complaint,
Summons,
Motion to Dismiss,
Motion for Change of Venue,
Minute Order of April 24, 1950,
Minute Order of May 2, 1950,

are the original or certified copies filed in the above-entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Sacramento, California, this 2nd day of May, 1950.

[Seal] C. W. CALBREATH,
Clerk.
By /s/ C. C. EVENSEN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal as designated by the attorneys for the respective parties herein:

Clerk's certificate (Northern Division) on transfer of case.

Complaint for freight charges.

Summons.

Motion to dismiss, etc.

Motion for change of venue under Rule 12 (b).

Order submitting motion for change of venue, etc.

Order transferring case to Southern Division.

Answer.

Plaintiff's motion for summary judgment.

Affidavit of Amadeo Paoni in opposition to motion for summary judgment.

Affidavit of Robert E. Davis in opposition to motion for summary judgment.

Order denying motion for summary judgment.

Request for admissions.

Defendant's admissions.

Notice of motion to set aside submission and reopen trial.

Order denying motion to set aside submission, etc.

Order for judgment.

Findings of fact and conclusions of law.

Judgment.

Motion for new trial.

Order denying motion for new trial.

Notice of appeal.

Cost bond on appeal.

Appellant's designation of record on appeal.

Order extending time to file Appellee's designation.

Appellee's designation of record on appeal.

Deposition of Amadeo Paoni.

Reporter's transcript, May 11, 1953.

Plaintiff's Exhibits 1, 2 (for id.).

Defendant's Exhibits A, B, C (for id.) and D (for id.).

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court, this 12th day of October, 1953.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 14078. United States Court of Appeals for the Ninth Circuit. West Coast Products Corporation, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 12, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14078

WEST COAST PRODUCTS CORP., a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF RECORD FOR PRINTING

West Coast Products Corp., a corporation, the appellant in the above-entitled action, pursuant to Rule 19 (6) of the Rules of the above-entitled Court, hereby presents the following statement of the points upon which it intends to rely on this appeal. (The parties will be referred to by the same designations as they appeared in the District Court, i.e., appellant as plaintiff and appellee as defendant.)

The rendering of judgment in favor of the plaintiff and against the defendant is not justified by the record and is contrary to law upon the following grounds and for the following reasons, to wit:

I.

That the olives in question were preserved in

juice or liquid other than alcoholic and were not olives, salt-cured, not preserved in liquid.

II.

That the proper freight charge was that actually made by the plaintiff under Item 3800 of the Tariff in question, which prescribes no minimum amount of liquid but simply states "Olives, canned or preserved, in juice or in syrup, or liquid other than alcoholic."

III.

That the Trial Court erroneously concluded that Item 5670 of the Tariff was applicable and gave judgment to the plaintiff for additional freight charges on what it stated were undisputed facts.

IV.

That the Court of Appeals is not bound by the findings of the Trial Court on undisputed facts.

V.

That the defendant is bound only by a fair and reasonable construction of the Tariff.

VI.

That the burden was on the plaintiff to show that the olives were of a character which called for a higher freight rate, and the plaintiff failed to meet the burden.

VII.

That the olives being included in more than one tariff designation, the defendant was entitled to select the designation which was more specific; and that where two tariff descriptions are equally appropriate, the shipper is entitled to the lower rate.

Pursuant to the aforesaid rule said appellant West Coast Products Corp., demands the entire record, including all pleadings, as the record on appeal.

Dated at San Francisco, California, this 3rd day of December, 1953.

/s/ ALBERT PICARD,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 7, 1953.

No. 14,078

United States Court of Appeals

For the Ninth Circuit

WEST COAST PRODUCTS CORPORATION,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

ALBERT PICARD,
405 Montgomery Street, San Francisco 4, California,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,078

United States Court of Appeals

For the Ninth Circuit

WEST COAST PRODUCTS CORPORATION,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

ABSTRACT OF CASE.

The appellee brought this action in the District Court for the Northern District of California to recover claimed additional freight charges and in its complaint (Tr. 4-7) alleged that the appellant became indebted to it in the sum of $1475.51 for under charges on various shipments of olives alleged to be salt cured olives transported by the appellee and its connecting carriers at the request of appellant from Orland, California, to various eastern destinations, and annexed to the complaint is an exhibit "A"

setting forth the various charges. It further alleges that the transportation charges were due on account of the transportation of said shipments pursuant to the plaintiff's tariffs duly posted, published and on file with the Interstate Commerce Commission, whereunder the proper freight charges were $5,447.64, on account of which there had been paid the previous freight charges amounting to $3972.13, and the appellee prayed for judgment for the difference of $1475.51, together with $44.26 taxes to the United States of America under provisions of the Internal Revenue Act.

The answer (Tr. 12-14), of the appellant denies that the olives were salt cured and alleges that the olives transported by the appellee for the appellant were oil-coated olives, and denies that any amount whatsoever is due or unpaid or that the appellee is entitled to any additional freight charges.

A trial was held and the evidence at the trial was without contradiction or dispute. The method of preparation of the olives and the nature and type of olives were covered entirely by the testimony of Amadeo Paoni, the vice-president of the appellant, who was in charge of the preparation and shipment of the olives. Subsequently the Court rendered a brief opinion (Tr. 58) in which it held that the tariff classification "Olives, salt-cured, not preserved in liquid" was applicable to the olives in question and

that the plaintiff was entitled to recover judgment. Findings of fact and conclusions of law (Tr. 59-63) in accordance with the order for judgment were signed and filed and judgment (Tr. 63-64) was filed and entered. A motion for a new trial (Tr. 65) was made and was denied by the Court (Tr. 66).

The broad question on this appeal is whether the trial Court erred in its judgment and findings on the undisputed evidence that the olives in question were covered by Item 5670 of the Trans-Continental Freight Bureau Eastbound Tariff No. 35, which reads "Olives, salt cured, not preserved in liquid" and were not covered by Item 3800 of said Tariff which reads "Olives, canned or preserved, in juice or in syrup, or liquid other than alcoholic". It is the contention of the appellant that the olives were covered by Item 3800 and that, therefore, the judgment should be reversed.

SUMMARY OF EVIDENCE.

The only evidence which was introduced with reference to the manner in which the olives here in question were processed, packed and shipped was that given by Amadeo Paoni, vice-president of appellant, who was called by the appellee as an adverse witness and who testified substantially as follows:

That the olives in question were received sometime in the month of December and the first thing he did

with them was to run them through a grader (Tr. 94) for size and to take out the olives that were bad; that he then washed them to take off the dirt and dust and put them in a wooden bin about 6 x 6 x 5 feet and put rock salt in the bin by first putting a layer of olives about 4 or 5 inches thick and then about 1 inch of salt on that layer, and then more olives and more salt until they got to the top; and by leaving the olives in the bin, together with the salt for a length of time dependent upon the weather (Tr. 95), the shortest length of time being 3 or 4 weeks and the longest time 5 or 6 weeks, the salt extracts the water from the olives; that the olives are then taken out of the bin and the salt shaken off by a machine (Tr. 96) so that there is no longer any salt on the outside of the olives; that they then dipped the olives in fresh water to completely dissolve the salt, and that they are then spread out on a table and oil is put on them; that for about 100 pounds of olives a one-half gallon of olive oil is used; that the olives are placed on a table and are rolled around in the oil to get the salt out of the olives and to place a coat of oil on every olive; that they are then placed in kegs containing 100 pounds net of olives (Tr. 97); that after the olives are filled into the keg, the keg is first capped with a layer of paper so that the olives do not come in contact with the wood, and then a wood cover put over that; that the keg is about 22 inches high

(Tr. 98) and about 16 inches in diameter; that between the oil and the liquid that comes from the olives themselves there are about 6 or 8 inches of liquid at the bottom of the keg; that the olives themselves have liquid (Tr. 99); that he himself followed this process with respect to the particular olives here in question; that the salt extracts the water from the olives (Tr. 100).

Under cross-examination by appellant's Counsel Mr. Paoni testified that the purpose of manipulating the olives with oil is that after the olives are covered with oil it keeps the olives so that they do not spoil; that if the olives are not covered with oil they dry up and do not keep their flavor; that the purpose is to preserve the olives; that when the olives are put in the barrel the olives have moisture in them which comes out from the olives and mixes with the salt and makes a juice to preserve the olives (Tr. 104); that the juice thus formed goes to the bottom of the barrel; that the barrels are turned and they keep turning the barrels and the juice is going up and down and keeps moisture upon the olives so that the olives are preserved in the juice (Tr. 105).

Mr. Paoni further testified that he supervised the processing and shipment of the olives in question; that the process used was that given in answer to the questions propounded to him; that the four carloads of olives here in question were processed, coated with oil, put in kegs, and shipped in the

manner which he has described (Tr. 109); that all the appellant's oil-coated or oil-cured olives were processed in the same manner which he has described (Tr. 108); that the olives here in question were processed and immediately thereafter shipped and that the length of time between processing and shipping does not exceed 10 days; that if necessary to obtain enough olives to make up a car they use other type olives in addition to the type in question (Tr. 110).

On redirect examination Mr. Paoni was asked if he did not put olive oil on the olives, whether they would tend to shrivel up and he answered that they are shriveled already when they are taken out of the brine and that the olive oil does not take any of the shriveling out of them. He further testified that it is not necessary to give instructions to the purchasers of these olives about turning the kegs as they already know that the kegs are to be turned as if they do not turn the kegs the oil does not get on the olives and the top gets dry, and that they should be turned once a week or at least once every two weeks (Tr. 113-114).

On re-cross-examination he testified that if the olives here in question were not coated or preserved in olive oil they would dry and become mouldy (Tr. 114).

The witness Krackov was called as part of the defendant's case. He is a broker dealing particularly in olive oil and olives, doing business under the name of Transoceanic Sales Co., having his prin-

cipal office in New York City. He has been engaged in the olive oil and olive business for 25 years and sold all types of olives, both imported and domestic (Tr. 152). He is familiar with the olives in the shipments here in question and with the manner of curing the same. He testified that the use of rock salt in this type of olives does not extract all the water (Tr. 154); that before the olive is packed moisture has not been extracted in its entirety; that about one-half of the moisture is left in the olive and that the effect of the olive oil is to preserve the olive against mould; that he has seen the kegs after they have been shipped and have been opened at the conclusion of the shipment and that he has found that the olives have been preserved in the liquid and juice of the olives and are fresh and edible (Tr. 155). That in the trade and in his experience with selling olives and with the shipment of olives and his general experience in the olive business as a whole preserving in liquid does not necessarily mean immersing in liquid (Tr. 156).

The foregoing constitutes all of the testimony which is material on this appeal and all of the testimony which was used by the trial Judge in reaching his determination.

STATEMENT OF POINTS ON WHICH APPELLANT RELIES.

It is the contention of the appellant that the rendition of judgment in favor of appellee and against the appellant is not justified by the record; that the olives in question were preserved in juice or liquid other than alcoholic and were not olives, salt cured, not preserved in liquid; that the proper freight charge was that actually made by the plaintiff under Item 3800 of the Tariff in question.

It is our further contention that the facts in the case are undisputed; that the trial Court reached an improper conclusion upon the undisputed facts; that the appellant is bound only by a fair and reasonable conclusion of the tariff, and that this Honorable Court is not bound by the findings of the trial Court on the undisputed facts; that the burden was on the appellee to show that the olives were of a character which called for a higher freight rate and that it failed to meet the burden and that, therefore, the judgment should be reversed and the United States District Court ordered to enter judgment in favor of the appellant.

The trial Court's findings are not entitled to much weight as the facts are undisputed and were so declared by the trial Judge.

Primarily, we desire to call attention to the fact that a jury was impaneled and heard the testimony offered by the plaintiff, but at the conclusion of the plaintiff's testimony the Court stated that there was no question of fact involved in the case at all; that

there was no question for the jury; and that it was the duty of the Court to decide which tariff should apply (Tr. 140-144); that the method by which the olives were packed and prepared is undisputed (Tr. 142). The trial Judge then stated that in his opinion it was entirely a question of law and that he would discharge the jury, and he thereupon sent for the jury and stated to it that he found that it was proper in this case for the Court to decide the matter as the case was a matter of law, and for that reason the jury was discharged (Tr. 150-151).

THE COURT OF APPEALS SHOULD DISREGARD THE FINDINGS IN THIS CASE.

While Rule 52 (a) provides that the findings of the trial Court shall not be set aside unless clearly erroneous, it has been held that to the extent that the findings are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, they are not binding upon the Court of Appeal.

Aetna Life Ins. Co. v. Kepler (1941), 8 Cir., 116 F. (2d) 1, 5;

Sanders v. Leech (1946), 5 Cir., 158 F. (2d) 486;

United States v. Still (1946), 4 Cir. 120 F. (2d) 876, 878, cert. den. 314 U. S. 671, 62 S. Ct. 135, 86 L. Ed. 537;

Campana Corporation vs. Harrison (1940), 7 Cir., 114 F. (2d) 400, 405-406.

In the present case, as we have seen, there is no conflict in the evidence. The findings of the trial Court, which we question on this appeal are entirely unsupported by any evidence whatever and were induced by an erroneous view of law. Therefore, they are not binding on this Court and should be set aside as all of the testimony shows that the Court selected the wrong tariff and improperly granted a judgment to the appellee contrary to the entire weight of the evidence.

TARIFFS AND RATES ARE PROMULGATED AND ESTABLISHED FOR THE USE OF LAYMEN AND THE INTERPRETATION SHOULD BE PRACTICAL.

In *Sonken-Galamba Corporation vs. Union Pac. R. Co.,* 145 Fed. (2d) 808, the Court states the following:

"In the discharge of our limited responsibilities, we must not forget that tariffs and rates are promulgated and established for the use of laymen in the course of their business affairs, and the interpretation must be susceptible of practical and ready application. * * * The shipments in question were accepted by the carrier as scrap iron, and freight rates were assessed and collected accordingly. The burden is therefore upon the carrier to show that at the time the material was shipped, it had a recognized commercial value for purposes other than remelting."

It is respectfully submitted that this rule of law is correct and is supported by numerous authorities set

forth in that case, and that under the application of the rule, the appellee having accepted the shipment in question as of the character specified under Item 3800 of its tariff and having assessed and collected the transportation charges based upon the rates specified for that classification, the burden was upon the appellee to show that at the time the olives were shipped they were of a character which called for a higher freight rate and the appellee has failed to meet that burden.

The olives in question being included in more than one tariff designation, the appellant was entitled to select the designation which was the more specific; (*United States v. Gulf Refining Co.,* 268 U. S. 542; *DeRamus vs. Mengel Co.,* 74 Fed. Supp. 425) and, where two tariff descriptions are equally appropriate, the shipper is entitled to the lower rate (*American Ry. Express Co. vs. Price Bros.,* 54 Fed (2d) 67).

The appellant is not bound by the carrier's intention or by its canons of construction in the interpretation of its tariff. The shipper is bound only by a fair and reasonable construction of the rules. The law compels carriers to publish and post their schedules of charges upon the theory that they will be informative. A shipper who consults them has a right to rely upon their obvious meaning. He cannot be charged with knowledge of the intention of the framers or the carrier's canons of construction or of some other tariff not even referred to in the one carrying the rate (*Swift v. U. S.,* 255 Fed. 291).

A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that an ordinary businessman can understand it, and, in connection with the rate sheets, can determine for himself what he can be lawfully charged for the transportation (*Swift v. U. S.,* supra; *Sonken-Galamba Corporation vs. Union Pac. R. Co.,* supra). The tariff being written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier (*DeRamus v. Mengel Co.,* supra).

The ultimate question of whether the shipments were properly classified under the tariff involves an application of the facts to the definition of the carrier's freight classification for determining the freight rate applicable, and the only application which can be reasonably made in this case is that the proper classification comes under Item 3800. It prescribes no minimum amount of liquid required to bring the olives under this classification. The trial Judge seemed to indicate that it is his view that in order that the olives be preserved in juice or syrup or liquid they must be immersed therein. There is no basis for this interpretation under Item 3800. It simply states "Olives, canned or preserved, in juice or in syrup, or liquid other than alcoholic". Item 5670, on the other hand, states "Olives, salt cured, not preserved in liquid". The words, "salt cured", in and of themselves are not the all-determining factor for, immediately following those words, we find the

words, "not preserved in liquid". Item 3800 does not exclude salt cured olives. The language in that Item is broad enough to include olives cured in any manner. The only requirement necessary to bring the olives under that classification is that the olives be canned or preserved in juice or in syrup, or in liquid other than alcoholic.

Webster defines the word "preserve" as follows: "To save from decay by the use of some preservative substance as sugar, salt, etc.; to prepare so as to prevent decomposition or fermentation as by seasoning, canning, etc." The testimony shows that the liquid was placed in the barrels and was sufficient to preserve the olives and is, therefore, sufficient to establish the fact that the olives in question were preserved in liquid.

From the foregoing it is respectfully submitted that there is no doubt that the provisions of Item 3800 are applicable to the olives here in question.

CONCLUSION.

Upon the basis of the foregoing it is respectfully submitted that the trial Court upon the undisputed facts applied the wrong tariff to the olives in question; that clearly the evidence shows that the olives were preserved in juice or liquid other than alcoholic and that, therefore, the judgment should be reversed. Since the evidence is undisputed there is no

purpose in remanding the cause for a new trial, but upon the evidence the trial Court should be ordered to enter judgment in favor of the appellant for its costs.

Dated, San Francisco, California,
March 8, 1954.

Respectfully submitted
ALBERT PICARD,
Attorney for Appellant.

No. 14,078

United States Court of Appeals
For the Ninth Circuit

WEST COAST PRODUCTS CORPORATION,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANT.

ALBERT PICARD,
405 Montgomery Street, San Francisco 4, California,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 14,078

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SOUTHERN PACIFIC COMPANY, a corporation,
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REPLY BRIEF FOR APPELLANT.

EVIDENCE.

In its summary of evidence the appellee has been substantially correct but has committed two errors which we believe are material.

In quoting from page 105 of the transcript the appellee states that while Mr. Paoni stated in his testimony that the height of the liquid in the barrel was 6 to 8 inches (Tr. 99) at page 105 of the transcript he says there were 6 inches of liquid in the bottom of the containers. This is incorrect as Mr. Paoni stated

there was "*about* 6 inches of liquid", which conformed with his previous testimony.

In the summary of the evidence the appellee further states that at page 129 of the transcript Mr. Rempel stated that simply coating a ripe olive with olive oil without salt-curing would result in its spoiling from bacterial decomposition. The testimony of Mr. Rempel in that regard actually was that simply coating a ripe olive with olive oil *without doing anything else at all* would result in its spoiling, which is entirely different from treating salt-curing as the only means of preservation.

ARGUMENT.

The appellee has gone to very great length in working out an elaborate distinction as to the various manners of preservation and endeavors to treat the type of olives which come under Item 3800 as being *solely* preserved in olive oil, and disregards the fact that while the olives may be salt cured, still the olive oil could be used as a preservative, and concludes by stating that the only reasonable conclusion is that the olives are not in a preservative when they are coated with oil and a quantity of water, even though that quantity of water and oil consists of more than one-fourth of the contents of the container.

This elaborate theory of appellee to maintain its position is obviously incorrect.

Item 3800 provides that olives, canned or preserved in juice or in syrup, or in liquid other than alcoholic, come under that item. All of the testimony in the case clearly shows that the oil placed on the olives and the liquid formed therefrom acted as a preservative of the olives in question. There is nothing in Item 3800 which states that it must be the sole preservative. The testimony of Mr. Paoni and Mr. Rempel clearly shows that the use of olive oil and the formation of liquid covering 6 to 8 inches of the height of 23 inches of the barrel prevented mold from taking place on the olives. This undoubtedly preserved the olives in juice or in liquid other than alcoholic and brings the case within Item 3800.

CONCLUSION.

On the basis of the foregoing it is respectfully submitted that the judgment of the trial Court should be reversed and upon the undisputed evidence judgment should be ordered in favor of the defendant.

Dated, San Francisco, California,
April 14, 1954.

Respectfully submitted,
ALBERT PICARD,
Attorney for Appellant.

No. 14079.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LESSIE B. HENRY and MILDRED LOUISE McDAVIS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 22920 CD.

Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.
Hon. William M. Byrne, District Judge.

OPENING BRIEF OF APPELLANTS.

RUSSELL E. PARSONS,
202 South Hamilton Drive,
Beverly Hills, California,

ABBOTT C. BERNAY, and
MAURICE T. LEADER,
229 North Broadway,
Los Angeles 12, California,

Attorneys for Appellants Lessie B. Henry and Mildred Louise McDavis.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

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OPENING BRIEF OF APPELLANTS.

STATEMENT OF BASIS OF JURISDICTION.

This is an appeal from a judgment by the District Court of the United States for the Southern District of California, Central Division, after a trial by the Court, sitting without a jury, finding the defendants and appellants guilty of a violation of U. S. C., Title 21, Section 174 (the illegal sale and concealment of narcotics). The appellant Lessie B. Henry was sentenced to a term of imprisonment for four years and to pay a fine of $1,000.00 on each of Counts 1, 2, 3 and 4, concurrently (total fine,

$1,000.00). The appellant Mildred Louise McDavis was sentenced to three years' imprisonment and a fine of $1.00 on each of Counts 1, 2, 3 and 4, the sentences to run concurrently (total fine, $1.00). The defendant Lessie B. Henry had been charged in Count 5 of the Indictment, but on this count he was acquitted [Clk. Tr. p. 16, as to McDavis; p. 14, as to Lessie B. Henry].

Following the judgment the appellants Henry and McDavis filed a timely notice of appeal, and are presently serving their terms in Federal institutions. Applications for bail, both to the District Court and this Court, were denied.

STATEMENT OF THE CASE.

The Indictment.

The Indictment charged a violation of U. S. C., Title 21, Section 174—illegal concealment and sale of narcotics.

Count 1 charged the defendants and appellants Lessie B. Henry and Mildred Louise McDavis with having, on or about February 12, 1953, in Los Angeles County, California, knowingly received, concealed and facilitated the transportation of approximately 436 grains of heroin; they, the defendants, then and there well knowing that the same had been imported in the United States of America contrary to law.

Count 2 charged a similar offense on or about February 13, 1953.

Count 3 charged a violation of U. S. Code, Title 21, Section 174, in that, after importation, the defendants had sold to one, Frank Stafford, 436 grains of heroin, on or about February 12, 1953.

Count 4 charged that the defendants and appellants Henry and McDavis had, after importation, sold to one, Frank Stafford, 430 grains of heroin, on or about February 13, 1953, in Los Angeles County.

Count 5 charged one, Jennell James, and Lessie B. Henry, one of the appellants in this case, with the transportation of 257 grains of heroin, on or about February 15, 1953.

After a verdict of guilty as to Counts 1 to 4, inclusive, and not guilty as to Count 5 as to the appellant Lessie B. Henry, a motion for new trial was duly made [Clk. Tr. pp. 11, 12]. This motion was denied.

The Judgment.

Defendants Lessie B. Henry and Mildred Louise McDavis were found guilty of Counts 1 to 4, inclusive, of the Indictment; Henry was found not guilty of Count 5.

The Court sentenced defendant and appellant Lessie B. Henry to four years' imprisonment and to pay a fine in the sum of $1,000.00 on each of Counts 1, 2, 3 and 4, concurrently (total fine, $1,000.00).

The Court sentenced defendant and appellant Mildred Louise McDavis to three years' imprisonment and to pay a fine of $1.00 on each of Counts 1, 2, 3 and 4, concurrently (total fine, $1.00) [Clk. Tr. pp. 12, 13].

While Jennell James took no appeal, she was sentenced to three years' imprisonment, which sentence was suspended, and she was placed on probation for a period of three years, on condition that she pay a fine in the sum of $350.00, at the rate of $10.00 per month [Clk. Tr. p. 13].

The motion for new trial as to defendants Lessie B. Henry and Mildred Louise McDavis was duly made, and by the Court denied [Clk. Tr. pp. 11, 12].

The Evidence.

Evidence was offered by the Government by a witness, Stribling, to the effect that he was a chemist, and that he tested the material here in question and that it was a narcotic. For the purpose of this appeal it was stipulated that the material involved herein was a narcotic drug known as heroin [Clk. Tr. p. 22]. A witness, Walter D. Kephart, testified he was a staff representative of the Pacific Telephone & Telegraph Company, and that he had access to certain records of the telephone company; that he had the records of the Los Angeles telephones, REpublic 37096 and REpublic 23155; that REpublic 37096 was listed during the period January, 1953, under the name of Wilma Carter at 2538 Fourth Avenue, Apartment 303. That the telephone, REpublic 23155, during January, 1953, was an unlisted number, but was listed to Jennell James at 2945 11th Avenue, Apt. 2. The bills as to REpublic 37096 were sent to Wilma Carter at 2945 11th Avenue, Apt. 2, the same address to which the bill for REpublic 23155 was sent [Rep. Tr. pp. 9, 10]. The witness stated that they had no records in the telephone company which bore the signature of subscriber [Rep. Tr. p. 16].

Frank Stafford testified he was employed by the Government of the United States, Narcotic Division, as an undercover agent [Rep. Tr. p. 30]; that he was so employed in February, 1953; that he was paid for his services [Rep. Tr. pp. 30, 31]; that he knew Lessie B. Henry, had known him for about three and one-half years [Rep.

Tr. p. 31]; that he knew Jennell James, had known her about one and one-half years [Rep. Tr. p. 31]; that he knew a girl known as Mildred for about a year and one-half. That on or about February 9, 1953, he met the defendant Lessie B. Henry in the 2900 block on 11th Avenue at an apartment house [Rep. Tr. p. 35]; that there were present Jennell, Mr. Henry's mother, and another man; that he was there about an hour before Mr. Henry arrived [Rep. Tr. pp. 36, 37]; that after Mr. Henry arrived, he had a conversation with him in the dining room [Rep. Tr. p. 43]. That at that time he asked Mr. Henry if it was possible to purchase an ounce of heroin, and Henry said it was possible, and he then asked Henry what the price would be, and Henry replied it would be $300.00 [Rep. Tr. pp. 43, 44]; that he told Henry he was not ready, but that as soon as he got ready he would make arrangements [Rep. Tr. pp. 44, 45]. That a day or two later he talked with Mr. Henry on the telephone; that he was in his own home in the presence of Officers Ross and Cassidy at the time he had the conversation; that he called a REpublic number, and Mr. Henry answered the phone [Rep. Tr. pp. 45, 47]; that he then told Henry he was ready to tend to the business that he had discussed a day or two previous, and Henry replied he was ready, but that he would have to get dressed and call back, which he did about an hour and a half later, and in that conversation he told the witness to go to Washington and Western; that someone would meet him; that he asked Henry if the party knew him, and Henry replied, "Yes, it will be someone who will know you." That the officers then searched him and searched his car, and gave him $300.00 [Rep. Tr. pp. 47, 48]. That he went to Western, just off Washington,

and in about ten minutes Mildred drove up; that he walked to the car, and Mildred told him to get in his car and follow her; that they then drove east on Washington to Harvard. She drove by, parked her car and walked back to the witness's car [Rep. Tr. pp. 49, 50]; she got in his car and told him which direction to go; that she asked for the money; he put the money on a napkin, and she put it in her purse [Rep. Tr. p. 51]. That after driving some distance, she got out of the car and instructed the witness to go on 22nd Street, which he did, and he remained there about ten minutes and she drove up and told the witness to follow her [Rep. Tr. pp. 54, 55]; they stopped near Hobart in the middle of the block and she then instructed the witness to go to a Richfield Station on Adams, and that the heroin would be in the bushes in front of the toilets [Rep. Tr. pp. 53, 54]; that he drove to the location and picked up a package near the toilets, and as he did, Officer Ross walked up and he handed the package to the officer. A minute or so later, Mildred came up and he told her he had picked up the package, and she said O. K., and they parted [Rep. Tr. p. 55]. The next day he talked to Mildred McDavis again over the telephone; at that time he asked her where Henry was, and she said he had gone to the barbershop, and she gave him a telephone number [Rep. Tr. pp. 57, 58]; that he called the barbershop and talked with Henry, said he was ready to transact the same business that he had had the day before; that he had shown the stuff to his partner, and he was satisfied with it. Henry said it was the same stuff and the price would be the same; that he was then talking from his house, and Officers Ross and Coster were present [Rep. Tr. p. 58]. That in about two hours the phone rang and it was Mildred. Mildred asked if he had

talked with Henry, and he said "yes," and that Henry was supposed to call him. He asked if she had heard from Henry, and she said, "Yes, and I will call you back in a short while." In about five minutes, she called back and told him to go to 29th and Normandie, and to call her when the witness arrived. The officers then searched him, gave him $300.00, and he went to 29th and Normandie [Rep. Tr. p. 59]. In about ten minutes Mildred came up and he went over and got in her car and she asked for the money. They counted out the money, and she then drove him back to his car and told him to go to 27th and Normandie and wait; that he went to 27th and Normandie [Rep. Tr. p. 60], and was there about fifteen minutes when Mildred came up; he got in the car with her, and she said that at 27th and San Pedro, and in front of the restaurant, there was a telephone booth, and that under the box the witness would find a package of heroin. He went there, followed by Officer Ross, looked under the box, and got the package of heroin. Officer Ross followed him, and on arrival at his home, he gave the package to Officer Ross [Rep. Tr. p. 61]. Officer Coster also came to his house, and he then made a phone call to Henry; that he was then sitting in a big arm chair, and Officer Coster sat on the arm and had his head by the receiver listening to the conversation; that he called Henry "Papa," and said "This boy I picked up is all beat up. He is bleeding all over the place." Henry replied, "Oh, he is all right, you check it and you will find it all there." [Rep. Tr. p. 63.]

On cross-examination the witness testified that he had been convicted of a felony, possession of narcotics, in 1935; that he had used narcotics [Rep. Tr. pp. 65, 66]; that he had used heroin, sometimes opium; that he had

had some heroin the night before he testified [Rep. Tr. pp. 66, 67]; that he had sold narcotics [Rep. Tr. p. 69]; that he had gone to work for the Government about the middle of January, 1953 [Rep. Tr. p. 71]; that one of the officers had asked him, he thought it was Mr. Ross; that he was to be paid $35.00 a week [Rep. Tr. pp. 72, 73]. That when he was given the money upon one occasion, he had a $100.00 bill and the rest in large bills—$20.00's or $50.00's [Rep. Tr. pp. 84, 85]. The witness on cross-examination admitted that he used about a cap a day of narcotics, which cost him about $4.00 a day [Rep. Tr. p. 130].

Philip P. Ross testified he was a Federal narcotic agent; had been with the service about three and one-half years. That he went to the vicinity of 2945 11th Avenue, Los Angeles, once about February 9, and again on February 11, 1953, in company with Agent Coster, and he saw Mr. Stafford go into the house at 2945 11th Avenue, and a short time after, Les Henry drove up [Rep. Tr. p. 206]; shortly thereafter Henry left, and Stafford came out a short time later; this was on the 9th. On the 11th, he saw Stafford go into the address shortly after he saw Henry drive up and go into the house; shortly thereafter Mr. Stafford and Mr. Henry came out and he saw them both in front of the house; that they left in separate cars [Rep. Tr. p. 206]. That on February 12, 1953, he was at the home of Mr. Stafford with Agent Coster [Rep. Tr. p. 208]; that Stafford dialed REpublic 37096 and had a conversation [Rep. Tr. p. 209]. About an hour and a half later, Mr. Stafford received a phone call, and thereafter Agent Coster gave him $300.00 government money; that he searched Stafford and followed him to Western and Washington [Rep. Tr. p. 212]; shortly thereafter

they saw Mildred McDavis drive up, Stafford went to her car and then returned to his car; she drove away and Stafford followed. Shortly thereafter they stopped and Mildred McDavis got into Stafford's car, and they drove south on Oxford past 21st Street, at which time Mildred McDavis left his car and returned to her car; about fifteen minutes later she drove by again, and Stafford followed her to about 22nd and Harvard. She then left her car, came back to his car, returned to her car, then again returned to her car, and they drove off, and McDavis stopped on Adams Boulevard and Stafford drove to 25th Place and Adams. They followed Stafford and walked over to where he was standing, which was in front of the ladies' rest room by some flowers, and Stafford reached over and picked up a package and gave it to the witness [Rep. Tr. p. 214]; the package he brought to the Federal Building. On the 13th of February he went to Stafford's apartment and Stafford dialed REpublic 37096 and had a conversation. Later he received a telephone call; they then searched Stafford and gave him $300.00 Government money; Stafford left and they followed him to 29th and Normandie; a short time thereafter Mildred McDavis came by, Stafford entered the car, they drove around the block and she returned him to his car and she drove away. Stafford drove to 27th and Normandie [Rep. Tr. p. 224]; he parked the car and waited about fifteen minutes, at which time Mildred McDavis drove up; that they were parked about a block away [Rep. Tr. p. 225]. After Mildred McDavis drove away, Stafford left and the witness followed him to 27th and San Pedro, at which place he saw Stafford go to a telephone booth at the corner of 27th and San Pedro, and enter it. He stayed there a very short time, then returned to his car, and the witness

followed Stafford to his house, at which time Stafford gave him a package, which was initialed and given to Agent Garberson at the Narcotics Division office. That on February 15th he went to the address at 2945 11th Avenue with Agents Garberson, Coster and Gentry; that about 3:00 o'clock they saw Henry and Jennell James come from the house and enter a Ford; from there they drove to 29th and San Pedro, Jennell James left the automobile at that location and the witness followed Henry back to 2945 11th Avenue.

That on February 15th he participated in the arrest of Henry at about 9:00 P. M. in the evening at Sunset Boulevard and Castelar Street; Henry was with Jennell James. At the time of his arrest they searched him and took $2200.00 from him. That they returned to the premises at 2945 11th Avenue at about 1:00 or 2:00 o'clock the following morning and searched the premises; that he found a package containing some Spotless Freezer Bags in a box of groceries in the kitchen of the house. That on February 15, 1953, he went to an address at 50th Street and Vermont Avenue, and that about half way in an alley between Vermont and Kansas Street he took a package from the base of a building, Government's Exhibit 3-B-1 [Rep. Tr. p. 241]. The officer stated that while talking with Henry that he had accused him of obtaining money through the sale of narcotics, but Henry did not say that he had received the money from the sale of narcotics; he said that he had received the money from the sale of narcotics; he said that he had received it from other people [Rep. Tr. pp. 263, 264].

Charles F. Garberson testified he was an agent connected with the Bureau of Narcotics, Federal Government,

and had been for about a year and a half; that on February 12, 1953 he saw the defendant Henry at an address on Fourth Avenue in a vehicle that went to 2945 11th Avenue, and there was a female in the car with him; subsequently he followed this car from the 11th Avenue address, a female was driving it, and the car went to Western and Washington where Frank Stafford was standing on a corner; Stafford walked over to the car and then returned to his car, and he then followed Stafford who drove to about 21st and Oxford, and about five minutes later a colored female left Stafford's car and went to the Chevrolet which he had been observing. He then lost both parties [Rep. Tr. pp. 306, 307]. That on the 13th of February he saw Henry on Central Avenue in the 4200 block, at which time he was driving a Ford convertible; that he saw Henry come out of McKinney's Barber Shop [Rep. Tr. p. 309]. A little later that day, February 13, he was in the vicinity of Arlington and Adams and he saw the brown Chevrolet he had previously observed, and in it was Mildred McDavis. He followed the car and he then saw Stafford's car shortly thereafter; Stafford parked at 27th and Normandie, and in a few minutes the brown Chevrolet came across 27th and Normandie, and Frank Stafford got out of his car and walked east on 27th Street [Rep. Tr. p. 312], and in a short time Stafford returned to his own car and drove south on Normandie [Rep. Tr. p. 313].

That on February 15th he went to 2945 11th Avenue; later in the afternoon he saw the defendant Henry with Jennell James driving in a 1953 Ford convertible; he followed them to a place near 29th and San Pedro, where he lost them; later that afternoon he was at the 11th

Avenue address where he saw the same car [Rep. Tr. pp. 315-316].

That he participated in the arrest of Mr. Henry and in the search that was made of Henry, and there was $2,280.55 taken from Mr. Henry's person [Rep. Tr. p. 316]. That he had made a list of currency, Government's Exhibit 5-A; that he made a list of currency on February 12th and February 13th, and after making the list of the numbers from the currency, he gave the money to Agent Ross; that some of that money he again saw on February 15th, being a part of the money taken from Mr. Henry [Rep. Tr. p. 321]. On February 12th and 13th he had taken serial numbers of some currency in the presence of Agents Ross and Coster [Rep. Tr. p. 355], and that he did not see that money again until the 15th when they removed some money from Mr. Henry's person; that subsequently he met Mr. Henry in the Federal Building and Henry demanded a return of his money, at which time he gave Mr. Henry $1,400.00 and retained $880.00 [Rep. Tr. pp. 361-363].

Ernest M. Gentry testified he was District Supervisor, United States Bureau of Narcotics, 14th District at San Francisco; that on February 15, 1953, he saw the defendant Henry and the defendant Jennell James [Rep. Tr. p. 365], at some time after 3:00 P. M. in the vicinity of 2945 Eleventh Avenue, at which time they were going toward a 1953 red Ford convertible automobile and they entered the car and drove away to about 29th and San Pedro to where the Ford was parked, and Miss James got out; the car drove away and Miss James walked down 29th to San Pedro and toward 28th, and she walked in an alley between a house and went behind 658½ East

28th Street [Rep. Tr. pp. 370-371]; she reappeared about ten minutes later and walked to the spot where she had left Henry and there was a barbecue and she went inside for a moment or two, then a cab drove up and she entered the cab and went to 50th and Vermont, where she went to Von's supermarket, where she alighted from the cab, walked in the door of Von's and down an alley that ran at a 90-degree angle to Vermont [Rep. Tr. pp. 371, 372]; he did not see her again until the 15th of February, 1953 [Rep. Tr. p. 373]. That while Miss James was in the alley near Von's Market, she placed a white object on the ground and took her foot and stomped the area; thereafter he saw Agent Ross retrieve a package from that spot [Rep. Tr. pp. 375-376]. On February 16, 1953, the agents went to an address at 658½ East 28th Street, where they went to a basement, and Agent Davis, who accompanied them, discovered six packages containing a white, powdery substance, and this was marked Government's Exhibit 3-B-1; that on the night of the 15th, the night of the arrest of Henry and James, he was present at a conversation with the defendant Henry.

Jennell James testified in her own behalf that she had lived in Los Angeles for 12 years; that she knew Henry, had known him for about four years; that she knew Mildred McDavis and had known her for about three years; and that she knew the witness Stafford as "Sleepy" [Rep. Tr. pp. 423-424]; that she was living at 2945 11th Avenue in February with Mrs. Pauline McCoy, who was Mr. Henry's mother; that Mildred McDavis and Henry moved into the establishment in February [Rep. Tr. p. 423]; that Stafford, or "Sleepy," had been

at the 11th Avenue address on several occasions. That on or about the 9th or 10th of February, Stafford came to the 11th Avenue address and asked for Mr. Henry. Some time afterwards Mr. Henry came in, at which time they had a conversation. Sleepy then asked Henry if he, Henry, wanted the house painted, and Henry told him no, that he was going on a trip; that after he returned he would talk more about it. Sleepy had some papers there, and said he wanted to sell a house. Henry told him he wasn't interested in buying a house. That there was no time while Sleepy was there that Henry and Sleepy were alone; there was no conversation regarding narcotics [Rep. Tr. pp. 431-432]. The witness testified that she had received several calls over the telephone from her mother and from a friend; that she was contemplating going to Hot Springs, Arkansas [Rep. Tr. pp. 433, 434, 435]; the witness denied that she had ever been in the vicinity of 50th Street in an alley, or that she had gone to a Von's Market [Rep. Tr. pp. 444-445].

Lessie B. Henry testified he had lived in Los Angeles seven or eight years, and that he lived at 2945 11th Avenue; that he moved from 4th Avenue to 11th Avenue about the 15th of February, 1953; that the apartment he had occupied on 4th Avenue was later rented by Wilma Carter; that he was acquainted with the witness Stafford by the name of "Sleepy"; that from time to time Sleepy would call him; that had given Sleepy his telephone number, both at 4th Avenue and on 11th Avenue [Rep. Tr. p. 450]; that Sleepy used to talk to his mother from time to time; that upon one occasion Sleepy had painted his mother's house inside and out. That about the 9th of February, someone called him and said Sleepy was at his mother's, and he went over there, at which time

Jennell and his mother were present; that he was there fifteen or twenty minutes, during all of which time his mother was there; that he sat in the dining room, and at that time he talked a few minutes with Sleepy. That at first Sleepy started talking about painting the house, that he neded a job, that he was broke [Rep. Tr. p. 453]. At that time the witness stated that he told Sleepy that he was going on a trip, and he said, "You can paint the place, but not now," but Sleepy said he wanted to paint the place because his wife was sick; then the witness testified that he told Sleepy he needed what money he had because he was going on a trip; that he had loaned Sleepy money many times, none of which had ever been repaid [Rep. Tr. pp. 453-454]; that he always considered Sleepy a friend of his mother's and of himself. Then Sleepy said he had some papers of a house, which was either his or his son-in-law's; that he wanted to sell, and he said he would sell it and he would have some money to pay the witness back if he could lend him some money. At that time the witness stated he told Sleepy he was not interested in buying the house [Rep. Tr. pp. 453-454]; that while Sleepy was in the house on the 9th of February, nothing was said about heroin or any narcotics [Rep. Tr. pp. 455-456]; that on the 10th Sleepy called him at the barbershop; that there was nothing said about narcotics at that time on the telephone; the witness stated he told Sleepy that he was just getting in the barbershop, and he would see him later [Rep. Tr. pp. 456-457]; that after leaving the barbershop he went to the 4th Avenue address and Mildred McDavis was there; that he stayed there; that he did not receive any phone calls that day [Rep. Tr. pp. 457-458]. That on the 12th he had a phone call from Sleepy, and Sleepy

wanted to know if he could get some money, that he wanted to paint the house, and the witness stated he told Sleepy he wasn't interested. That he never offered to sell Sleepy any narcotics, that he had no narcotics to sell [Rep. Tr. p. 459]; that he was arrested on the 15th of February, and that on the 13th he never left the apartment, except to go to his mother's; that on the 13th of February he had no conversation with Sleepy about narcotics [Rep. Tr. pp. 461-462]. That on the 13th he had a conversation with Mildred, at which time Mildred told him that she had received $300.00 from Sleepy, that Sleepy had given her the money to keep, and Mildred then gave him the money to keep for Sleepy [Rep. Tr. pp. 462-463]; that on the 14th he received a phone call from Sleepy; that on the 14th he and Mildred went over to his mother's in the afternoon [Rep. Tr. p. 464]; that his mother and Jennell and Mildred were there. He walked in the house and Sleepy said he needed his money, and at that time he gave him $600.00; that Mildred had given him $300.00 one day and $300.00 on another day, and had said it was Sleepy's money for keeping until Sleepy asked for it [Rep. Tr. p. 466]. That on the 15th, Mildred McDavis walked out of the house with him in the daylight; they got in the Ford and they drove to San Pedro Street over to Central; that he stopped at the intersection of 29th and San Pedro, and that Mildred was with him, dressed in slacks and wearing a purse and glasses; she got out at a barbecue stand, and he went to get his shoes; that he did not hand her any packages [Rep. Tr. pp. 469-470]. He then went over to Central Avenue, that the place was closed, and that he went directly home; when he arrived Jennell was there; later Mildred called him and he went over and picked her

up at 43rd and Vermont [Rep. Tr. pp. 470-471]; and they then returned home.

The witness denied that he at any time gave any narcotics to Sleepy, or that he had any narcotics in his possession, or that he ever talked about the possession or sale of narcotics [Rep. Tr. pp. 472-473]. When his attention was directed to Government's Exhibit 1-C, he denied having ever seen the package; denied ever having seen Government's Exhibit 3-A; the only time he ever saw any packages was when the police showed him a package and asked him if he had seen it before [Rep. Tr. p. 474].

That at the time of his arrest there was $2,280.00 taken from his person, and some time later he had $1,400.00 given back to him by the Government agents [Rep. Tr. p. 476]. The witness stated that he never knew at any time that the Government agents were following him [Rep. Tr. pp. 476-477].

Gracie Cox testified she lived at 2945 11th Avenue. Apt. 1, and was living there in February, 1953; that she lived there with her husband and brother and sister-in-law. That she knew Jennell James; that Jennell James, in February, was living at the same address in Apartment 2 [Rep. Tr. pp. 499, 500]; that on the 15th day of February she saw Jennell James and, to the witness's knowledge, Jennell James did not leave the house that day [Rep. Tr. pp. 501, 502]; the witness stated that she knew it was the 15th because Jennell and Henry were leaving for a trip [Rep. Tr. pp. 503, 504].

Eva Mae Bradley testified that she lived at 2171 West 30th Street; that she knew Jennell James, and that she was at her house February 15th. She had been there for

a few days occupying her apartment with her, and she slept there the night before; that Jennell was there at all times that day [Rep. Tr. pp. 510, 511, 512]. That on the 15th, during the course of the day in the afternoon, she saw Mr. Henry come to the establishment accompanied by Mildred McDavis; this was about 1:00 o'clock in the afternoon [Rep. Tr. pp. 512, 513].

Tessie Mae Hynson testified she was the mother of Jennell James; that she lived at 1938 Rimpau Boulevard, Los Angeles; that her daughter, Jennell James, on the 15th of February was residing on 11th Avenue; that Jennell was planning a trip, she having been operated on [Rep. Tr. pp. 522, 523]. That she communicated with her daughter on the 15th at about 1:30, talked with her on the telephone at her home, and she was there; she talked with her again at 4:15, and she was there. She particularly remembered these conversations because the girl had had surgery and the doctor had told her to be quiet for a day or two [Rep. Tr. pp. 524, 525].

Jennell James testified that on the 14th of February, at her home on 11th Avenue, she saw a person known as "Sleepy"; that she saw Henry count out some money and hand it to Sleepy [Rep. Tr. pp. 526, 527].

Pauline McCoy testified that on the 14th of February she saw "Sleepy"; that she had known him for three years; that she had been friendly with him. That Sleepy was there in the afternoon, and Mildred Jennell and her son were there, and she saw her son count out some money and give it to Sleepy. At that time Sleepy said he wanted to paint the house; that he also wanted her son to buy a house from him, Sleepy. Her son said he couldn't, he

wasn't able to, but that he would see about it after his trip [Rep. Tr. p. 530].

Mildred Louise McDavis testified she lived at 2945 11th Avenue; that she moved there about February 15th; that she moved in with Mr. Henry, defendant in the case; that she had known him about three years [Rep. Tr. pp. 534, 535]; that she had known Sleepy, that he had been over to their home many times. That about February 12th she had a phone call from Sleepy; that he asked for Henry, and she told him Henry was not there. Sleepy then said he would like to see her; she asked him what he wanted, and he said he would prefer to come over and talk to her rather than over the phone [Rep. Tr. pp. 538, 539]. He said he would like to meet the witness and she said she would meet him, so she met him. At that time she asked him what he wanted and he said he wanted her to do a favor for him, and she asked, well, what is it? and Sleepy said, "Well, I can't discuss it right now because I think I am being followed." Sleepy told her he was going to drive around and see if he was still being followed, and he told her to meet him at a certain place, and she did [Rep. Tr. pp. 539, 540]. When he met her he asked her to keep some money for him. She said, "How much?", and he said, "$300.00." She then asked him why he couldn't keep it himself, and he said he would prefer not to. She then asked him about his being followed, what was happening, but he said that he would rather not discuss it, but that it had nothing to do with the money [Rep. Tr. pp. 540, 541]. She then asked, did he want her to have the money. She then said she was a little leery about it, and he said he would make sure he wasn't being followed. He then told her to meet

him at another place, and she did. He was standing on the street, and she drove up and he gave her the money and told her he would call later. Later she saw Henry and told him about the meeting with Sleepy; she then gave the money to Henry [Rep. Tr. pp. 541, 542]. She saw Sleepy again on the 13th, at which time he called her and said he wanted to see her. He then gave her a number and she called him back, for she said she had not dressed yet. After she dressed she called him, and Sleepy asked her to meet him again and she went to the place he had named [Rep. Tr. pp. 542, 543]. When they met she said, "Did you call me to get your money?" and he said "No," that he thought he was still being followed, and asked her to keep driving, and they drove around. He then gave her some more money, $300.00, and asked her to keep it for him. She then went home and she gave the money to Henry [Rep. Tr. pp. 544, 545]. That on the 15th of February she moved; Henry was leaving on his trip that day; that they moved around noon to the 11th Avenue address, and there she saw Jennell, Mrs. McCoy, Peggy and Grace [Rep. Tr. pp. 544, 545]. That she left there during the afternoon with Henry in a 1953 Ford: that they intended to go to the Louisiana Hot Spot on 29th Street where they specialized in barbecue [Rep. Tr. pp. 546, 547] and they went there; Henry did not get out of the car because he was going to the shoe shop to get his shoes; that she told Henry that she would call a cab after she was through shopping. Henry then left; she went into the barbecue place; then she went to a grocery store but found it was closed; then she went across the street to a public restroom on 28th Street. She then went back to the Louisiana Hot Spot, and at the barbecue stand she had something to eat [Rep. Tr. pp. 548, 549,

550]. She got in a cab and drove to Von's Market on Vermont. She had shopped there before, and that she went out of the market through the front door, the same one she entered [Rep. Tr. p. 552]. She then went to a drug store and made some purchases; she then called Henry and he came and picked her up and they went directly home [Rep. Tr. p. 553]. That on the early morning of the 16th of February she was aroused by officers who came in and searched the premises; that she had her clothes on the dining room chair, at which time one of the officers said, "Are these the clothes" [Rep. Tr. p. 556].

Frank J. Stafford was recalled as a rebuttal witness, and stated that after the 12th of February he had never been to the 11th Avenue address; that he never received $600.00, or any sum, from either Mr. Henry or Miss McDavis or Miss James [Rep. Tr. p. 597].

SPECIFICATIONS OF ERROR.

I.

The defendants were entrapped by the agent working with the Government narcotic agents. The conviction, therefore, must fall.

II.

The evidence is insufficient to support Counts 1 and 2 of the Indictment, charging, in effect, transportation. The judgment in this case also amounts to double punishment and double jeopardy.

SUMMARY OF THE ARGUMENT.

1. It is our contention that the winess Frank J. Stafford, also known as "Sleepy," was a paid informer, as is shown by the evidence, and he was actually working for agents of the Government, narcotics officers and being paid $35.00 a week. He admitted on cross-examination that he was a user of narcotics, and that he had been employed by the narcotics officers and had been told by them what to do and who to contact. For some time he had been friendly with the defendants, had visited at their home, and quite often visited the residence of the defendant Henry's mother. In fact, it was Stafford who went to the mother's home and waited for Henry. It was he who first suggested that Henry obtain some narcotics for him. There is no evidence in this case which shows that the idea first arose in the mind of either of these appellants. The entire scheme was laid out by the Government agents and carried out by the agent Stafford. It was, we say, entrapment.

2. It is our contention, in connection with Point 2, that the evidence was insufficient to support Counts 1 and 2 of the Indictment, which, in effect, charged transportation. That if any transportation be proved, and we contend that it was not, that it was only incidental to the "sales" which Stafford, the Government agent, claims were made. Nothing in the entire evidence shows this. Notwithstanding appellant Henry was seen to leave the house and McDavis rode with him, there is nothing to show that he had any narcotics in the car, or that he aided in any manner or facilitated the transportation thereof, if, in truth, and in fact, narcotics were actually transported by anyone in this case.

ARGUMENT.

I.

The Defendants Were Entrapped by the Agent Working With the Government Narcotics Agents. The Conviction Therefore Must Fall.

The evidence clearly shows that Frank J. Stafford, also known as "Sleepy," was a narcotic user who had satisfied his desire for heroin only the night before he testified [Rep. Tr. p. 67]; that he was an ex-convict [Rep. Tr. p. 65], and was in the employ of the Government as an undercover agent working for the Narcotic Division, and paid for his services [Rep. Tr. pp. 30, 31]. That he knew appellant Henry for three and one-half years [Rep. Tr. p. 31]; appellant Mildred McDavis, a year and a half, and defendant Jennell James about three and one-half years [Rep. Tr. p. 341]. That on February 9, 1953, he went to the home of defendant Henry on 11th Avenue, Los Angeles; that when he arrived Mr. Henry was not there [Rep. Tr. p. 35], but Jennell and Henry's mother were. He waited [Rep. Tr. p. 36] for an hour or more [Rep. Tr. p. 36] for Henry, during which time, at his request, Jennell phoned and tried to locate Henry [Rep. Tr. p. 38]. That after waiting and trying to reach Henry, he arrived [Rep. Tr. p. 43]; that he had a conversation with Henry in which he asked if it was possible to get some heroin [Rep. Tr. p. 44]; Henry said, "Yes"; then Stafford, or "Sleepy," said he was not ready at that time but would call him as soon as he got ready and make arrangements [Rep. Tr. pp. 44, 45]. A day or two after, he called Henry on the phone [Rep. Tr. pp. 45, 46]; Stafford was calling from his home while Narcotics Officers Ross and Cassidy were present [Rep. Tr. p. 46]. He told Henry he was ready to attend to the business they

had talked about. Henry said he would call back, which he did later, and agreed to a meeting place, saying some one would be there who knew Stafford [Rep. Tr. pp. 47, 48]. The officers present then searched Stafford and gave him $300.00. He then met Mildred McDavis, gave her the money [Rep. Tr. pp. 50, 51, 52], and she told him to go to a Richfield Station near Adams, where he would find a package in the bushes in front of the toilets there. He went there, picked up a package and gave it to Narcotics Officer Ross [Rep. Tr. pp. 54, 55]. A day or two later he called Mildred on the telephone [Rep. Tr. p. 57]; he asked for Henry and she said he was at the barber's, and he could call; she gave him a number [Rep. Tr. pp. 56, 57]. He called, talked to Henry, and said he wanted to transact the same business [Rep. Tr. pp. 57, 58]. Henry said he would call; he did not, but Mildred did, and arranged to met him [Rep. Tr. pp. 58, 59]. Officers Cassidy and Ross gave him $300.00, and he drove over and met Mildred, and she directed him to a restaurant where he picked up the heroin in a phone booth; he then went home and there gave the package to Ross [Rep. Tr. p. 61]. Stafford stated a Government agent, Ross, asked him to go to work for them [Rep. Tr. pp. 71, 72] and instructed him what to do [Rep. Tr. p. 72], and he was paid $35.00 a week [Rep. Tr. p. 73].

Surely this was entrapment. The plan conceived in the mind of the officer, and this paid narcotic user, ex-felon, told what to do. Henry and McDavis were lured into this trap by a man who had known them for years—visited at their home. This is against sound public policy.

Butts v. United States, 273 Fed. 35, 38;
Newman v. United States, 299 Fed. 128, 131;
Sorrells v. United States, 287 U. S. 435, 77 L. Ed. 413.

See also:

Lufty v. United States, 198 F. 2d 760;

Woo Wai v. United States (C. C. A. 9), 233 Fed. 412;

Sam Yick v. United States (C. C. A. 9), 240 Fed. 60.

II.

The Evidence Is Insufficient to Support Counts 1 and 2 of the Indictment, Charging, in Effect, Transportation. The Judgment in This Case Also Amounts to Double Punishment and Double Jeopardy.

We will not here again review the evidence, for it has already been fully stated, we respectfully suggest, in our statement of the evidence. Counts 1 and 2 of the Indictment allege transportation of the narcotic by these defendants. Counts 3 and 4 allege sales of the narcotic. Counts 1 and 3 and Counts 2 and 4 appear to state the same incidents. In other words, if the entrapping informer, the Government agent Stafford, who was a narcotic user, is to be believed, and Counts 3 and 4, the "sales" counts, are to stand, it is our contention that Counts 1 and 2 were but incidental; that is to say, the transportation was but incidental to Counts 3 and 4, the "sales." The only evidence with reference to transportation is the fact that the appellants were seen in an automobile. They both explained that their trip in the car was for a legitimate purpose, and there is no evidence from which it might be properly inferred that the trip was for anything else. No one saw them take anything out of the automobile; no one saw them put anything in the automobile, and there is nothing from which the

Court could believe beyond a reasonable doubt that these appellants transported the narcotic, as is alleged.

In order to impose separate punishments, the courts have held that there must be evidence of separate and divisible acts that are not incidental to each other. In determining this question, the courts have refused to dissect the evidence minutely in an attempt to find separate offenses, but, on the contrary, have held that a broad transactional approach should be made. The evidence in the instant case, so viewed, shows that any transportation by these appellants was incidental to its sale, if it be held that a sale was, in truth and in fact, established beyond all reasonable doubt. However, we still assert that there was no evidence of transportation, and if there was, it was incidental. We respectfully say Counts 1 and 2 must fall.

While the trial court was the trier of facts, and we are familiar with the rule, however, this Court has a right to examine the evidence and consider the same in properly determining the issues herein presented. It is difficult to understand what induced the Court to reach its decision, for the conviction rests upon the evidence of an ex-convict, a paid entrapper and a narcotic addict, who had used heroin as late as the night before he testified. It should be borne in mind that Stafford's testimony as to what occurred at the Henry home was refuted by Henry himself and by Henry's mother, and the testimony with reference to the comings and goings of the defendant Jennell James was refuted by three or four witnesses. Surely, their testimony should not be cast aside and that of a witness, the type of Stafford, believed, but this is what the Court did, apparently.

It is our contention that Counts 1 and 2 of the Indictment must fall, for any transportation, if the Court determine any had been established, was incidental to the sales, if the Court believe they were established beyond all reasonable doubt. The convictions as to Counts 1 and 2 as to these appellants is in violation of Amendment V to the United States Constitution—"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

While we realize that decisions by appellate courts of our states are not binding, this subject of double punishment has been quite thoroughly treated recently in the case of *People v. Branch,* decided by the District Court of Appeal, First District, Division 1, California, 260 P. 2d 27. 30.

See also:

People v. Knowles, 35 Cal. 2d 175, 217 P. 2d 1.

In the *Knowles* case, *supra,* numerous cases are cited which we think establish our point, and the Court had this to say:

> "The possession of narcotics is an offense distinct from the transportation thereof, but there can only be one conviction when a single act of transportation is proved, and the only act of possession is that incident to the transportation."

See also:

Schroeder v. United States (C. C. A. 2), 7 F. 2d 60, 65.

In the *Schroeder* case, *supra,* at page 65, the Court further said:

> "Possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses. But, where the only possession shown is that which is necessarily incidental to the transportation, the offense is single, and not double."

Citing:

Miller v. United States, 300 Fed. 529, 534;
Morgan v. United States, 294 Fed. 82, 84;
Rossman v. United States, 280 Fed. 950, 953;
Reynolds v. United States, 280 Fed. 1.

The law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and punished for an offense consisting of one or more such incidents. To do so would be to inflict double punishment.

In re Nielsen, 131 U. S. 176, 185.

Conclusion.

The Court erred in the particulars that we have pointed out, and for the reasons set forth hereinabove, we respectfully pray that the judgments and the orders denying the motions for new trial be reversed and set aside as to each of the appellants, to the end that justice may be done.

Respectfully submitted,

Russell E. Parsons,
Abbott C. Bernay, and
Maurice T. Leader,
Attorneys for Appellants Lessie B. Henry and Mildred Louise McDavis.

No. 14079.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LESSIE B. HENRY and MILDRED LOUISE McDAVIS,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

MANLEY J. BOWLER,
Assistant United States Attorney,
Chief of Criminal Division,

RICHARD L. SULLIVAN,
Assistant United States Attorney,

600 Federal Building,
Los Angeles, California,

Attorneys for Appellee, United States of America.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

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BRIEF OF APPELLEE.

Jurisdiction.

The Indictment in this case was returned and filed on June 10, 1953, in the United States District Court for the Southern District, Central Division, the case in the District Court being numbered 22920-CD [Clk. Tr. pp. 2-5].

The Judgments and Commitments following a finding of guilty as to each defendant under Counts 1, 2, 3 and 4, and upon dismissal of Count 5 against defendant, Lessie B. Henry, upon motion of the United States Attorney, following a finding of not guilty, were made and filed on July 20, 1953 [Clk. Tr. pp. 14, 16]. The Notice of Appeal was made, served and filed by defendants on July 23, 1953 [Clk. Tr. p. 17].

Jurisdiction in the United States District Court is conferred by Title 18, United States Code, Section 3231, and jurisdiction in this Court is conferred by Title 28, United States Code, Sections 1291 and 1294.

Statement of the Case.

In Count 1 of the Indictment appellants are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 12, 1953, they did, after importation, knowingly and unlawfully receive, conceal, and facilitate the transportation of approximately 436 grains of heroin [Clk. Tr. p. 2].

In Count 2 of the Indictment, appellants are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 13, 1953, they did, after importation, knowingly and unlawfully, receive, conceal, and facilitate the transportation of approximately 430 grains of heroin [Clk. Tr. p. 3].

In Count 3 of the Indictment, appellants are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 12, 1953, they did, after importation, knowingly and unlawfully sell to Frank Stafford a certain narcotic drug, namely, approximately 436 grains of heroin [Clk. Tr. p. 3].

In Count 4 of the Indictment, appellants are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 13, 1953, they did, after importation, knowingly and unlawfully, sell to Frank Stafford, a certain narcotic drug, namely, approximately 430 grains of herin [Clk. Tr. p. 4]. In Count 5 of the Indictment appellant, Lessie B. Henry and codefendant, Jennell James, are charged with the violation of Section 174, Title 21 of the United States Code, in that on or about February 15, 1953, they did, after importa-

tion, knowingly and unlawfully, receive, conceal and facilitate the transportation of approximately 257 grains of heroin [Clk. Tr. p. 5].

Appellants Lessie B. Henry and Mildred Louise McDavis were found guilty under Counts 1 through 4 inclusive, of the Indictment. Henry was found not guilty under Count 5. Defendant Jennell James was found guilty under Count 5 and takes no appeal [Clk. Tr. pp. 11-13].

Statute Involved.

Section 174, Title 21 of the United States Code, provides in pertinent part as follows:

> "Section 174. Importation of narcotic drugs prohibited; penalty; evidence.
>
> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years.
>
> * * * * * * * *
>
> Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. As amended November 2, 1951, c. 666, Secs. 1, 5(1), 65 Statutes 767."

Statement of Facts.

Appellants have detailed a concise, and it is opined, essentially fair and complete statement of facts. However, inasmuch as appellants in their brief would cast suspicion upon the testimony of the government witness, Frank J. Stafford, appellee desires to demonstrate by its method of presentation of Frank Stafford's testimony, that said testimony is corroborated and its veracity assured to the greatest extent possible in this type of case.*

February 9, 1953:

Frank Stafford went to an apartment house located in the 2900 block on Eleventh Street where he met with appellant Lessie B. Henry [Rep. Tr. p. 35; Corr. Rep. Tr. p. 206], and arranged with Henry to contact him later concerning a future purchase of heroin [Rep. Tr. pp. 43, 44, 45].

February 12, 1953:

A day or two later Philip P. Ross, Government Narcotics Agent, testified as to the date being February 12 [Rep. Tr. p. 208], Stafford had a telephone conversation with Henry [Corr. Rep. Tr. p. 209] wherein he told Henry that he was ready to transact the business discussed a day or two earlier [Rep. Tr. pp. 44, 47], and a second telephone conversation [Corr. Rep. Tr. p. 212] wherein he was directed by Henry to go to Washington and Western Streets and that he would be met there by someone who knew him [Rep. Tr. p. 48]. After Stafford's person and automobile had been searched and he

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*[Corr. Rep. Tr. p. .....] refers to testimony of Government Narcotics Agent Philip P. Ross, wherein he corroborates testimony of Government witness Frank J. Stafford.

had been given $300.00 by the narcotics officers [Rep. Tr. p. 48; Corr. Rep. Tr. p. 212] he proceeded by automobile to the appointed meeting place [Rep. Tr. p. 49; Corr. Rep. Tr. p. 212], whereat he was met by appellant Mildred Louise McDavis [Rep. Tr. p. 49; Corr. Rep. Tr. p. 213]. Stafford followed Mildred McDavis' automobile for a short distance whereupon they stopped their automobiles and Mildred McDavis joined Stafford in his automobile and directed him to drive on further [Rep. Tr. p. 51; Corr. Rep. Tr. pp. 213, 214]. After telling Stafford that she thought Henry was giving him an awful good buy Mildred McDavis requested the money and it was given to her [Rep. Tr. p. 51]. Mildred McDavis then got out of Stafford's car, into her own [Rep. Tr. p. 53; Corr. Rep. Tr. p. 213], and speaking to Stafford again after they had moved their respective automobiles to a new location [Rep. Tr. pp. 53, 54; Corr. Rep. Tr. p. 214] she instructed him that he would find the heroin in bushes upon the premises of a gas station located at 25th and Adams Streets [Rep. Tr. p. 54]. Stafford proceeded to the designated gas station, discovered the heroin in the bushes as McDavis had told him he would, and handed the heroin to Narcotics Officer Ross, who in the meantime had arrived upon the scene [Rep. Tr. p. 55; Corr. Rep. Tr. p. 214].

February 13, 1953:

Stafford made a telephone call [Corr. Rep. Tr. p. 223] at which time he spoke with Mildred McDavis who gave him the telephone number where Henry could be reached [Rep. Tr. p. 57]. Stafford then telephoned Henry [Corr. Rep. Tr. p. 223] and informed him that he wished to purchase another ounce of the stuff. Henry stated that the stuff and the price would be the same, but that he

would have to call Stafford back later [Rep. Tr. p. 58]. About two hours later Stafford received two telephone calls [Corr. Rep. Tr. pp. 223, 224] from Mildred McDavis who during the last conversation directed him to go to 29th and Normandy Streets [Rep. Tr. p. 59]. After being searched and given $300.00 by the narcotics officers [Rep. Tr. p. 59; Corr. Rep. Tr. p. 224] Stafford proceeded to the appointed meeting place and was met by Mildred McDavis [Rep. Tr. p. 60; Corr. Rep. Tr. p. 224]. After various other movements by Stafford and McDavis similar to their movements of the previous day [Rep. Tr. pp. 60, 61; Corr. Rep. Tr. pp. 224, 225, 228], Stafford gave McDavis the $300.00 and was told by her that he would find the narcotics inside a telephone booth located in front of a restaurant at 27th and San Pedro Streets [Rep. Tr. pp. 60, 61]. Stafford went there, found the narcotics where Mildred McDavis had told him he would [Rep. Tr. p. 61; Corr. Rep. Tr. p. 228], and went home whereat he delivered the package of narcotics to Officers Ross and Coster [Rep. Tr. p. 61; Corr. Rep. Tr. pp. 228, 232]. From his home Stafford placed a telephone call [Corr. Rep. Tr. p. 232] to Henry and told him that this boy he had picked up, is beat all up; he is bleeding all over the place. After reassuring Stafford that none of the contents of the package could leak out Henry stated that if anyone had fooled with it besides Mildred he might say that it would be wrong, but he was sure it was right because she is the only one that handled it [Rep. Tr. pp. 63, 64].

Questions Involved.

1. *Were the appellants unlawfully entrapped by government agents?*

2. *Is the evidence sufficient in support of Counts 1 and 2 of the Indictment?*

3. *Does the judgment in this case amount to double punishment or double jeopardy?*

Summary of the Argument.

Under well established principles of law the facts in this case do not constitute unlawful entrapment of the appellants because there is no showing that the corrupt intent was originated in the minds of appellants by the government agents.

The conviction under Counts 1 and 2 of the Indictment must stand because there is evidence independent of the evidence of sale showing that on the dates alleged, appellants knowingly received, concealed and facilitated the transportation of heroin. In any event, there was no prejudicial error because concurrent sentences were imposed upon appellants pursuant to their conviction under Counts 1, 2, 3 and 4 of the Indictment.

ARGUMENT.

I.

The Appellants Were Not Unlawfully Entrapped.

Entrapment exists only where government agents induce and originate a criminal intent of a defendant. There is no entrapment where criminal intent is already present in the defendant's mind and agents merely afford the opportunity for commission of the crime.

> *Stein v. United States* (C. C. A. 9, 1948), 166 F. 2d 851, cert. den. 334 U. S. 844.

In *United States v. Ginsburg* (C. C. A. 7, 1938), 96 F. 2d 882, cert. den. 305 U. S. 620, it was held that there was no unlawful entrapment where the evidence showed that the witness, an admitted addict, informed the narcotics agents that he would be able to purchase narcotics from the defendant; that the agents, in turn, furnished the informer with money with which he approached the defendant and asked him to sell him narcotics; that defendant sold the informer narcotics; that these acts were all accomplished under the direction and at the instigation of narcotics agents who had agreed to see to it that the informer would be compensated by the government.

In the case at hand, Frank Stafford and the government agents merely presented to the appellants an opportunity to activate the criminal intent pre-existing in the appellants' minds. Appellee believes that the facts relied upon by appellants do not show unlawful entrapment and that the trial court was justified in so finding.

II.

Sufficiency of Evidence in Support of Counts 1 and 2 of the Indictment.

The evidence is sufficient to support Counts 1 and 2 of the Indictment. It is the well-settled rule that the Court on appeal will not try the facts anew, but will sustain the findings if the trier of fact had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion which was reached.

Frank Stafford testified that on February 12, 1953, he was instructed by Henry to proceed to a certain place and that there he would be met by someone who knew him [Rep. Tr. p. 48]; that he followed these instructions and was met by Mildred McDavis, who revealed to him the exact hiding place of the heroin, which was concealed in the bushes upon the premises of a gas station [Rep. Tr. p. 54].

Frank Stafford testified that on February 13, 1953, he again spoke to both Henry and Mildred McDavis upon the telephone and was directed by the latter to go to a certain meeting place. Here Mildred McDavis again revealed the exact hiding place of the heroin to Stafford, which was this time concealed within a telephone booth [Rep. Tr. p. 61].

Federal Narcotics Agent Philip P. Ross testified that on February 16, 1953, he discovered a cache of heroin in a box of groceries located in the kitchen of a house at 2945 Eleventh Street [Rep. Tr. p. 240].

Lessie B. Henry testified that he lived at 2945 Eleventh Avenue [Rep. Tr. p. 447] and that this was his mother's address [Rep. Tr. p. 448].

The trial court was justified in drawing inferences from these and other facts that from the dates alleged in Counts 1 and 2 of the Indictment the appellants, acting either singly or together, moved the heroin alleged in Counts 1 and 2 of the Indictment from the house at 2945 Eleventh Avenue and transported it to and concealed it in the places where it was subsequently found by Frank Stafford.

III.

Conviction Under Counts 1, 2, 3 and 4 of the Indictment Does Not Constitute Double Punishment or Double Jeopardy.

A. Test of Identity of Offenses.

The test to be applied in determining the question of the identity of offenses charged in two or more counts of an indictment or in separate indictments is whether each requires proof of facts which is not required by the others.

> *Mills v. Aderhold, Warden* (C. C. A. 10, 1940), 110 F. 2d 767.

Specific reference has heretofore been made by appellee to the testimony which supports Counts 1 and 2 of the Indictment. This evidence is also more than adequate to satisfy the test as stated above.

In the case of *Parmagini v. United States* (C. C. A. 9, 1930), 42 F. 2d 721, cert. den. 283 U. S. 818, the appellant there made the identical contention under similar cir-

cumstances as appellants presently make. There the instant court answered this contention as follows:

> "Under this law (Jones-Miller Act, 21 U. S. C. 174) concealment and sale are distinct offenses and therefore each act is punishable, although both occur in connection with a single transaction (citing cases). The count which states that the defendant sold morphine and concealed morphine states two distinct offenses, whether the charge of selling is under the Jones-Miller Act (21 U. S. C. 174) or under the Harrison Narcotic Law (26 U. S. C. 692). Therefore, consecutive sentences of five years for selling morphine and ten years for concealing morphine illegally imported were proper and, in the discretion of the trial court, might be made to run consecutively.
>
> See also *Albrech v. United States,* 272 U. S. 1, 47 S. Ct. 250, and *Silverman v. United States,* C. C. A. Mass., 1932, 59 F. 2d 636, cert. den., 287 U. S. 640."

B. There Was No Prejudicial Error.

Appellants assert that in Counts 1 and 2 of the Indictment the Government did not allege, nor at the time of trial did it prove, offenses separate from those alleged in Counts 3 and 4 of the Indictment. Appellee believes that no prejudicial error accrued to appellants even if this contention be correct.

Appellant Lessie B. Henry was sentenced to a term of imprisonment for four years and fined the sum of $1,000.00 on each of Counts 1, 2, 3 and 4, concurrently (total fine, $1,000.00) [Clk. Tr. p. 14]. Appellant Mildred Louise McDavis was sentenced to three years imprisonment and fined $1.00 on each of Counts 1, 2, 3 and 4, the sentences to run concurrently (total fine, $1.00) [Clk. Tr. p. 16].

Inasmuch as the sentences run concurrently and there is but one fine upon all four counts, there was no prejudicial error in this regard.

Parmagini v. United States, supra, page 725, and cases therein cited.

Conclusion.

The judgment should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MANLEY J. BOWLER,
Assistant United States Attorney,
Chief of Criminal Division,

RICHARD L. SULLIVAN,
Assistant United States Attorney,

Attorneys for Appellee, United States of America.

No. 14079.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LESSIE B. HENRY and MILDRED LOUISE McDAVIS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22920 CD.

Upon Appeal From the District Court of the United States for the Southern District of California, Central Division. Hon. William M. Byrne, District Judge.

REPLY BRIEF OF APPELLANTS.

RUSSELL E. PARSONS,
202 South Hamilton Drive,
Beverly Hills, California,

ABBOTT C. BERNAY, and
MAURICE T. LEADER,
229 North Broadway,
Los Angeles 12, California,

Attorneys for Appellants Lessie B. Henry and Mildred Louise McDavis.

The Myers Legal Press, Los Angeles. Phone VAndike 0007

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TABLE OF AUTHORITIES CITED

No. 14079.

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Hon. William M. Byrne, District Judge.

REPLY BRIEF OF APPELLANTS.

Come now the appellants and for reply to the brief of the appellee herein, respectfully call the Court's attention to these matters:

ARGUMENT.

I.

Entrapment.

The Government contends that in this case Stafford merely made it possible for the appellants to commit the offense. The Government contends that the "corrupt intent" was originated in the minds of the appellants and

not by suggestion of the Government agents. Under the cases cited both by ourselves and the Government in the briefs on file, it is well established that entrapment lies where people are induced to commit public offenses—where they are lured into a trap. This is against sound public policy. (*Butts v. United States,* 273 Fed. 35, 38; *Lufty v. United States,* 198 F. 2d 760; *Sam Yick v. United States* (C. C. A. 9), 240 Fed. 60.)

Frank J. Stafford testified he was employed by the Government of the United States as an undercover agent for the Narcotic Division, and that he was being paid for such services [Rep. Tr. pp. 30, 31]. That this man is a Government agent there can be no question, and our contention that he was attempting to lure people into the commission of violations of federal laws we think is amply supported by the evidence. It should be borne in mind that this same Frank Stafford was a witness for the Government in the case of *United States of America v. James Boyd Brown,* a case which arose in the same Southern District of California, and bears case No. 22940, and which case came to this Court on appeal and was by this Court reversed. It bore No. 14132 in this Court. May we also point out that he was a witness in a narcotics case in a matter presently before this Court on appeal, in the matter of *Leo Williams, Appellant v. The United States of America, Appellee,* bearing this Court's No. C. C. A. 14177.

Stafford testified that he had known the appellant Lessie B. Henry for three and one-half years; that he had known Jennell James for about three and one-half years [Rep. Tr. pp. 31, 32]; that he had known the appellant Mildred Louise McDavis for a year and a half [Rep. Tr. p. 34]. That he was acquainted with the resi-

dence of the defendant Henry's mother, and that he himself went there [Rep. Tr. pp. 35, 36]; that he waited at the address at 2945 Eleventh Avenue for Mr. Henry to arrive for about an hour, at which time he talked and visited with Jennell James awaiting Henry's arrival. He, the Government agent, Stafford, who was a confessed user of drugs, attempted to get the girl at the house to call a number and find Henry for him [Rep. Tr. p. 38]. It was he, Stafford, who first proposed to Henry that Henry obtain for Stafford some heroin [Rep. Tr. p. 44]. At the very time he was contacting Henry, other Government agents were watching Stafford while he attempted to set up the trap. It was Stafford who pursued Henry, and it was Stafford who was attempting to induce Henry to break the law. It should be borne in mind that Stafford was asked by a Government agent to go to work for the Government; he thought it was Mr. Ross, the agent who testified in this case [Rep. Tr. pp. 71, 72]. This whole plan was conceived in the minds of the Government agents, and Stafford was used in this and other cases to attempt to carry out their plans of entrapment. As we have heretofore said, Stafford knew the appellants, Lessie B. Henry and Mildred Louise McDavis, and the defendant Jennell James, and had known them for a substantial period of time. For instance, he had known Mildred McDavis over a period of time, and in the year and a half prior to his testifying, had seen her fifteen or twenty times [Rep. Tr. p. 78]. It should be borne in mind that the Government agent, Stafford, was known as "Sleepy"; had known appellant Henry for some years, and that he often visited at the home of Henry's mother. The mother testified that she had been friendly with Stafford, and at the time of Stafford's visit to the house there was some conversation

in which Stafford said he wanted to paint the house, and he, Stafford, also wanted the mother's son, Henry, to buy a house from him [Rep. Tr. p. 530].

We respectfully suggest that the long period of acquaintanceship between Stafford (Sleepy), the Government undercover agent, with the appellants, Henry and McDavis, and with the defendant Jennell James and with the appellant Henry's mother, and his frequent visits to the home of the appellant Henry's mother, made an ideal arrangement for the use of Stafford by Ross and other Government agents to entrap the appellants. We think the evidence susceptible of only one reasonable interpretation, and that the conduct of the Government agents was entrapment. The long period of friendship between these parties rebuts the Government's contention that the Government's activities merely "afforded" the appellants an opportunity to violate the law.

We should call the Court's attention to the statement in appellee's brief (p. 9) to the effect that narcotics agent Ross discovered a cache of heroin on February 16, 1953, located in a box of groceries in the kitchen of a house at 2945 Eleventh Street. This is a clear misstatement of the evidence, for there is no such evidence. We assume that counsel did this mistakenly. The evidence is to the effect that Agent Ross discovered a package with a label thereon, "Spotless Freezer Bags. Excellent for Home Freezing." They were plastic bags that you put vegetables in in a refrigerator or freezer. He testified that he found these bags in a box of groceries at the Eleventh Avenue address, which box was on the floor among other boxes of pots and pans. He then testified in answer to the question, "And are these bags in the same condition as when you first observed them? A. Yes. Q. I mean there

was nothing in them at the time? A. No." You will thus see that all he found was some empty plastic bags. A statement to the effect that he found a cache of heroin in the box of groceries is inconceivable from the sworn testimony of the witness himself [see Rep. Tr. pp. 239, 240].

II.

Insufficiency of the Evidence.

We again renew our contention that the evidence is insufficient to support Counts 1 and 2 of the Indictment charging transportation. It has been and is our clear-cut contention that there was no clear-cut evidence to support the charge of transportation. There was no evidence upon which a Court could reasonably conclude that guilt had been established beyond a reasonable doubt.

We are not unmindful of the case of *Parmagini v. United States,* 42 F. 2d 721, cited by the Government in its brief, and the rules of law therein discussed. However, the evidence here is plainly insufficient, it is our contention.

The Government also relies upon the *Parmagini* case, *supra,* for its contention that no prejudice was worked upon the appellants because the sentences run concurrently. We realize that in the *Parmagini* case that statement was made, but rather severe sentences were meted out in this case against the appellants as compared with the judgment against Jennell James, and we do not believe it can safely be said that the Court did not consider the number of counts that were involved in pronouncing such a severe sentence. The mere fact that he made the sentences run concurrently is of little help to us. We think that the pronouncement of the Court, with all due

respect to it, was a very unrealistic approach to the matter in hand. We respectfully call the Court's attention to the case of *People v. Branch,* 119 A. C. A. 564, 260 P. 2d 27, at page 31, where the Court had this to say:

> "(9) The Attorney General seeks to avoid the effects of this error by pointing out that, since the sentences on the two counts have been made to run concurrently, no possible prejudice can result from the judgment. This is an unrealistic approach. The dual judgment may very well adversely affect appellant's rights when he comes before the proper authorities to have his definite term fixed. This factor was sufficient to require a reversal in People v. Kehoe, 33 Cal. 2d 711, 204 P. 2d 321; People v. Roberts, 40 Cal. 2d 482, 254 P. 2d 501; People v. Knowles, 35 Cal. 2d 175, 217 P. 2d 1; People v. Craig, 17 Cal. 2d 453, 110 P. 2d 403."

We are quite satisfied that the dual judgments in these cases may very well adversely affect these appellants' rights. They have been prejudiced.

Conclusion.

Wherefore, appellants respectfully pray that for the reasons urged, these judgments appealed from be reversed.

Respectfully submitted,

Russell E. Parsons,
Abbott C. Bernay, and
Maurice T. Leader,

Attorneys for Appellants Lessie B. Henry and Mildred Louise McDavis.

No. 14080

United States
Court of Appeals
for the Ninth Circuit

WONG KEN FOON, as Guardian Ad Litem for WONG HING GOON,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-20-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

BRENNAN & CORNELL,
Suite 812 Rowan Bldg.,
458 S. Spring St.,
Los Angeles 13, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 14406

WONG KEN FOON as Guardian Ad Litem for WONG HING GOON,

Plaintiff,

vs.

JAMES P. McGRANERY, as United States Attorney General,

Defendant.

PETITION TO ESTABLISH NATIONALITY; DECLARATORY JUDGMENT UNDER SECTION 503 OF THE NATIONALITY ACT OF 1940

Comes now the plaintiff, Wong Hing Goon, by his guardian ad litem, Wong Ken Foon, and complains of the defendant and for cause of action alleges:

I.

For the purpose of this action, Wong Ken Foon was appointed by the above-entitled Court and now is the guardian ad litem of plaintiff, Wong Hing Goon.

II.

That said plaintiff is a true and lawful blood child of Wong Ken Foon who is a citizen of the United States; that as evidence of his United States citizenship, Wong Ken Foon holds Certificate of Identity No. 32494 issued January 3, 1921,

by the Immigration Office at San Francisco, California; that said Wong Ken Foon was born at Nom On Village, Hoy Sun District, Canton, China, on January 1, 1909 (KS 34-12-10). [2*]

III.

That the said Wong Ken Foon was admitted to the United States as the son of a Native, at San Francisco, California, when he arrived on November 26, 1920, on the S.S. Tjikemsang (File No. SF 19729/33-13); that Wong Ken Foon has been a permanent resident of the United States since November 26, 1920; that said Wong Ken Foon has made two trips from the United States to China, as follows, to wit:

> Departed from San Francisco, September 27, 1926, via S.S. President Taft, and returned to San Francisco on October 5, 1927, via S.S. President Grant;
>
> Departed from Los Angeles July 10, 1932, via S.S. President McKinley, and returned to Los Angeles August 21, 1933, via S.S. President Grant.

IV.

That the said Wong Ken Foon was married to Eng Shee on September 28, 1926 (CR 15-8-22), at Nom On Village, Hoy Sun District, Kwangtung, China; that such marriage was contracted in accordance with the marriage customs and ceremonies approved and legally recognized in China; that no official record of such marriage is available in China

*Page numbering appearing at foot of page of original Certified Transcript of Record.

so far as the said Wong Ken Foon is informed; that the plaintiff, Wong Hing Goon, was born June 24, 1927 (CR 16-5-25), at Nom On Village, Hoy Sun District, Canton, China; that the plaintiff, Wong Hing Goon, is issue of the aforesaid marriage of Wong Ken Foon and Eng Shee; that the aforesaid marriage and the birth of said plaintiff was duly reported to the Immigration and Naturalization Service by the said Wong Ken Foon upon each and every occasion of his examination by that service.

V.

That the said Wong Ken Foon is and has been continuously since November 26, 1920, a resident within the Southern District of California, Central Division; that the petitioner, Wong Hing Goon, [3] claims permanent residence in the Southern District of California, Central Division, and within the jurisdiction of this Court.

VI.

That the said Wong Ken Foon caused to be filed with the United States Department of Justice, on or about the 18th day of January, 1952, an application for admission to the United States, at Terminal Island, San Pedro, California, in behalf of the plaintiff herein; that said plaintiff was advised by the United States Department of Justice at Terminal Island, San Pedro, California, on the 1st day of August, 1952; that said petitioner's application for admission had been denied; that the said Wong Hing Goon claims that the refusal of the

United States Department of Justice to permit his admission to the United States is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national.

VII.

That the defendant is the duly appointed, qualified and acting Attorney General of the United States; that the plaintiff's application for admission to the United States was denied by the United States Department of Justice on the 1st day of August, 1952; that the United States Department of Justice did, on the 1st day of August, 1952, deny the plaintiff a right or privilege as a national of the United States.

VIII.

That this complaint is filed and these proceedings are instituted against the defendant under Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 1172, 8 U.S.C. 903), for a judgment declaring the plaintiff to be a national of the United States.

IX.

That the plaintiff has never committed any act of or executed any instrument of expatriation now renounced his United States citizenship; that the plaintiff is entitled to be declared a national of the United States. [4]

X.

That the plaintiff, Wong Hing Goon, claims to be a United States citizen and/or national, such citizenship and/or nationality having been acquired pur-

suant to the provisions of Section 1993, Revised Statutes of the United States, as amended by the Act of May 24, 1934, and Section 201 (g) of the Nationality Act of 1940 (8 U.S.C.A. 601 (g)).

Wherefore, plaintiff prays for judgment declaring him to be a national of the United States and for such other and further relief as may be just and proper.

BRENNAN & CORNELL,

By /s/ BERNARD BRENNAN,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed August 12, 1953. [5]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, James P. McGranery, as United States Attorney General, through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California, and Clyde C. Downing and Arline Martin, Assistants United States Attorney for the Southern District of California, and in answer to plaintiff's Complaint herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I. of said Complaint.

II.

Referring to the first averment of Paragraph II of said Complaint, denies that plaintiff is a true and lawful blood child of Wong Ken Foon who is a citizen of the United States; admits the remainder of the allegations contained in Paragraph II of said Complaint.

III.

Referring to the allegations contained in Paragraph III of said Complaint, admits that the said Wong Ken Foon was admitted by a Board of Special [7] Inquiry to the United States as the son of a native at San Francisco, California, on December 27, 1920, and admits that he arrived on November 26, 1920, on the S.S. Tjikemsang; admits each and every other allegation in said Paragraph III contained.

IV.

Referring to the allegations contained in Paragraph IV of said Complaint, denies said allegations.

V.

Admits the allegations contained in Paragraph V of said Complaint.

VI.

Referring to the last sentence contained in Paragraph VI of said Complaint, denies that the refusal of the United States Department of Justice to permit his admission to the United States is an arbitrary and unreasonable refusal, and admits that the denial to admit plaintiff is a right or privilege of a United States national and alleges that the Depart-

ment of Justice denies such right or privilege to plaintiff on the grounds that he is not a citizen; admits each and every other allegation contained in said Paragraph VI; alleges that on July 24, 1952, the Board of Immigration Appeals denied a motion to reopen proceedings before the Board of Special Inquiry and dismissed plaintiff's appeal.

VII.

Referring to the allegations contained in Paragraph VII of said Complaint, admits that the defendant is the duly appointed, qualified and acting Attorney General of the United States; that plaintiff's application for admission to the United States was denied by the United States Department of Justice on July 24, 1952, and that plaintiff was advised of that decision on the 1st of August, 1952, and admits that such denial was the denial of a right or privilege of a national of the United States and alleges that the denial was on the grounds that plaintiff was not a national of the United States; denies each and every other allegation therein contained.

VIII.

Defendant neither admits nor denies the allegations contained in Paragraph VIII of said Complaint, the same being a conclusion of law. [8]

IX.

Referring to the allegations contained in Paragraph IX of said Complaint, denies said allegations.

X.

Referring to the allegations contained in Paragraph X of said Complaint, admits that plaintiff claims to be a United States citizen pursuant to the provisions of Section 1993, Revised Statutes of the United States (48 Stat. 797) but alleges that the amendments to that act made by the acts of May, 1934, and the Nationality Act of 1940 (8 U.S.C. 601(g)) are inapplicable to plaintiff if, as alleged, he was born after 1924 and on or about June 24, 1927, which we deny.

Wherefore, this answering defendant prays judgment as follows:

1. That plaintiff's Complaint on file herein, be dismissed, and that plaintiff take nothing by virtue thereof;

2. For its costs of action incurred herein; and

3. For such other and further relief as the Court may deem just and proper in the premises.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 4, 1952. [9]

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION OF HERBERT BROWNELL, JR., AS UNITED STATES ATTORNEY GENERAL, AS PARTY DEFENDANT

It Is Hereby Stipulated, pursuant to the provisions of Rule 25(d), Federal Rules of Civil Procedure, that Herbert Brownell, Jr., as United States Attorney General, be substituted as party defendant in the above-entitled case.

Dated: March 25th, 1953.

BRENNAN & CORNELL,

By /s/ BERNARD BRENNAN,
Attorneys for Plaintiff.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ HARRY R. TALAN,
Acting Asst. U. S. Attorney,
Attorneys for Defendant.

It Is So Ordered:

This 25th day of March, 1953.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed March 25, 1953. [11]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case having come on for trial on March 24, 1953, and having been tried on March 24 and 25, 1953, before the Honorable Harry C. Westover, Judge presiding, without a jury, the plaintiff appearing by his attorney, Bernard Brennan, and the defendant appearing by his attorneys, Walter S. Binns, United States Attorney, and Clyde C. Downing, Assistant United States Attorney, Chief, Civil Division, and Harry R. Talan, Acting Assistant United States Attorney, and evidence having been introduced on behalf of the plaintiff and the defendant and the Court having considered the same, and having heard the arguments of counsel and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

I.

That Herbert Brownell, Jr., is the duly appointed and qualified and Acting [13] Attorney General of the United States of America, and as such is the head of the Department of Justice and in such capacity is the executive head of said United States Department of Justice of which the Immigration and Naturalization Service is a Department.

II.

That on or about February 15, 1952, a Board of Special Inquiry of said Immigration and Naturali-

zation Service ordered the plaintiff herein excluded from the United States on the ground that said plaintiff is not a citizen of the United States and was not in possession of a valid Immigration Visa, or of a Passport or documents in lieu of a Passport issued by the Country to which he owes allegiance.

III.

That Wong Ken Foon, alleged father of the plaintiff herein, was on or about December 27, 1920, admitted to the United States from China, as the son of a native and on or about January 3, 1921, was issued Certificate of Identity #32494 by the Immigration and Naturalization Service at San Francisco, California.

IV.

That the plaintiff herein claims permanent residence in the Southern District of California, Central Division.

V.

That the plaintiff herein was permitted to travel to the border of the United States by virtue of Travel Affidavit #4171, and was there, on or about January 18, 1952, taken into custody by the Immigration and Naturalization Service and held in exclusion status pending determination of his status by a Board of Special Inquiry.

VI.

That the Board of Special Inquiry of the Immigration and Naturalization Service, held at San Pedro, California, on February 15, 1952, determined

that plaintiff herein was not a citizen of the United States, and was not admissible to the United States as such. [14]

VII.

That on July 24, 1952, the Board of Immigration Appeals affirmed the decision that plaintiff herein was not a citizen and should be excluded from the United States; that thereafter, on August 12, 1952, plaintiff herein, filed this judicial proceeding to have his claim of citizenship determined by this Court.

VIII.

That the evidence adduced by the plaintiff herein has contained so many discrepancies and contradictions relating to subjects about which he should reasonably be expected to have some knowledge and recollection and the credibility of the testimony of the plaintiff has been so impeached that as a result the Court does not believe the testimony of the plaintiff herein, and there is not sufficient credible evidence to support plaintiff's claim that he is a United States citizen.

IX.

That the plaintiff herein was born in China, but that said plaintiff is not the son of Wong Ken Foon, and is not a citizen of the United States.

Conclusions of Law

I.

The jurisdiction of this Court in the above-entitled action is pursuant to the Act of October 14, 1940,

Ch. 876, Title I, subchapter 5, section 503, 54 Stat. 1171 (8 U.S.C. §903).

II.

The decision that plaintiff herein was not a citizen and should be excluded from the United States was affirmed by the Board of Immigration Appeals on July 24, 1952, and thereafter, on August 12, 1952, the plaintiff filed this judicial proceeding to have his claim of citizenship determined by this Court.

III.

The burden is on the plaintiff herein to establish his claim to United States citizenship and the said plaintiff has failed to sustain such burden, and the Court concludes that the plaintiff Wong Hing Goon is not a national or citizen of the United States and is not a son of Wong Ken Foon. [15]

IV.

Judgment should be entered in favor of the defendant and against the plaintiff in the above-entitled action, dismissing the plaintiff's complaint and cause of action and adjudging that said plaintiff is not a citizen of the United States and directing that said plaintiff be excluded from the United States and returned to China and that costs be awarded the defendant in this action.

Dated: This 8th day of April, 1953.

/s/ HARRY C. WESTOVER,
Judge, United States
District Court.

Approved as to form pursuant to Local Rule 7(a), this 7th day of April, 1953.

By /s/ BERNARD BRENNAN,
Attorney for Plaintiff.

Received copy of the above Findings of Fact and Conclusions of Law this 7th day of April, 1953.

By /s/ BERNARD BRENNAN,
Attorney for Plaintiff.

[Endorsed]: Filed April 8, 1953. [16]

In the United States District Court in and for the Southern District of California, Central Division

No. 14406-HW

WONG KEN FOON, as Guardian Ad Litem for WONG HING GOON,

Plaintiff,

vs.

HERBERT BROWNELL, JR., as United States Attorney General,

Defendant.

JUDGMENT

The above-entitled case having come on for trial on March 24, 1953, and having been tried on March 24 and 25, 1953, before the Honorable Harry C. Westover, Judge presiding, without a jury, the plaintiff appearing by his attorney, Bernard Brennan, and the

defendant appearing by his attorneys, Walter S. Binns, United States Attorney, Clyde C. Downing, Assistant United States Attorney, Chief, Civil Division, and Harry R. Talan, Acting Assistant United States Attorney, and the Court having considered and heard the arguments of counsel, and the Court having considered the same and the cause having been argued and submitted to the Court for its decision, and the Court having heretofore made and filed its Findings of Fact and Conclusions of Law and having ordered that a Judgment be entered in accordance therewith:

Now, Therefore, It Is Ordered, Adjudged and Decreed:

I.

Judgment is hereby entered for the defendant and against the plaintiff [17] in the above action and it is hereby adjudged that the complaint and cause of action shall be and the same are hereby dismissed and the plaintiff Wong Hing Goon is not a citizen or national of the United States.

It is hereby directed that said plaintiff be excluded from the United States and returned to China, and that the defendant recover his costs in this action. Costs taxed at $20.00.

Dated: This 8th day of April, 1953.

/s/ HARRY C. WESTOVER,
Judge, United States District Court.

Approved as to form pursuant to Local Rule 7 (a), this 7th day of April, 1953.

By /s/ BERNARD BRENNAN,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 8, 1953.

Docketed and entered April 9, 1953. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73 (B)

Notice is Hereby Given that:

Wong Ken Foon, as Guardian Ad Litem for Wong Hing Goon, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 9, 1953.

BRENNAN & CORNELL,

By /s/ WM. E. CORNELL,
Attorneys for plaintiff.

[Endorsed]: Filed June 5, 1953. [19]

[Title of District Court and Cause.]

ORDER EXTENDING TIME ON APPEAL

Upon motion by counsel for plaintiff, and there being no objection from counsel for the defendant, and good cause appearing therefor;

It is Ordered that the time to file the record on appeal is hereby extended 90 days from the Notice of Appeal herein.

Dated: July 14, 1953.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed July 15, 1953. [20]

In the United States District Court, Southern District of California, Central Division

No. 14406-HW

Honorable Harry C. Westover, Judge Presiding

WONG KEN FOON, as Guardian Ad Litem for WONG HING GOON,

Plaintiff,

vs.

HERBERT BROWNELL, JR., as United States Attorney General,

Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff:

BERNARD C. BRENNAN, ESQ.,
453 South Spring Street,
Los Angeles, California.

For the Defendant:

WALTER S. BINNS,
United States Attorney; by

HARRY R. TALAN,
Assistant United States Attorney.

March 24, 1953, 10:00 A.M.

The Clerk: Wong Ken Foon, as guardian ad litem for Wong Hing Goon, vs. James P. McGranery, defendant, No. 14406, for trial.

Mr. Brennan: Ready for the plaintiff, your Honor.

Mr. Talan: Ready for the defendant.

The Court: We will make the usual order that all the witnesses will be excluded except the plaintiff.

Mr. Brennan: Your Honor, I am going to call as the first witness the father of the boy, so probably we can keep him in.

The Court: He can take the stand and all the rest of the witnesses will be excluded.

Swear the interpreter.

(Whereupon, Lily Chan was duly sworn to act as interpreter.)

Mr. Brennan: Will you take the stand, please?

Mr. Talan: At this time I would like to have entered as part of the record several stipulations we have entered into.

The Court: Just a minute. Has there been a stipulation relative to change of the defendant?

Mr. Brennan: I have a written stipulation I neglected to present to counsel, but during the recess we can do that, and then at the bottom of it we have the provision, "It is so ordered," and we will present that to your Honor during the [3*] morning

The Court: All right.

Mr. Talan: May we also have entered the record of the administrative proceeding, and a stipulation that it is authentic and a true and correct copy of the hearing that was reported therein?

Mr. Brennan: Yes, subject to our calling to the court's attention any discrepancies that might have

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

occurred by reason of the interpreter's translation. We have no question about the authenticity of the record or its correctness as interpreted, and we are not raising any technicality on getting the record in, but we are not stipulating as to the accuracy of the transcript and of the interpreter's remarks.

Mr. Talan: That is accepted.

WONG KEN FOON

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: State your name, please.

The Witness: My name is Wong Ken Foon.

Mr. Brennan: At this time I call to the court's attention that the government has furnished us with photostatic copies of two documents prepared by the inspector on the return of the father, both on the President Grant, one October [4] 6, 1927, and the other on the President Grant on 8/19/33. We would like to offer in evidence these photostatic copies in place of and to the same effect as if they were originals.

The Court: They may be received and marked Plaintiff's Exhibits 1 and 2.

Mr. Brennan: The first one is 1927.

The Clerk: So marked.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 1 and 2.)

(Testimony of Wong Ken Foon.)

Direct Examination

By Mr. Brennan:

Q. Where do you live?

A. I am living at 838½ San Julian Street, Los Angeles.

Q. How long have you lived in Los Angeles County?

A. As long as I have been in the United States I have been living in the Los Angeles area.

Q. That is how long? When did you come to the United States? A. I came CR 9.

Q. That is the 9th year——

A. Ninth year of the Republic of China.

Mr. Brennan: Can you give us the American date on that?

The Interpreter: Yes. 1920 or early part of [5] 1921.

Mr. Brennan: Counsel, as I take it there is no question raised by the government as to this witness having been issued and holding a certificate of identity No. 32494 issued on January 3, 1921, by the immigration office in San Francisco, California?

Mr. Talan: That is conceded.

Q. (By Mr. Brennan): Where were you born?

A. In China.

Q. And where in China?

A. Toy Shan, Canton, China.

The Court: What village?

The Witness: Nam On Chuen.

The Interpreter: That is C-h-u-e-n or T-u-e-n.

(Testimony of Wong Ken Foon.)

Mr. Brennan: How do you spell the district phonetically as he gave it?

The Interpreter: N-a-m O-n——

Mr. Brennan: The district is what I am asking about.

The Interpreter: Nam On, Toy Shan, or Hsin Ning Sin.

Mr. Brennan: Could it be Hoy Sin?

The Interpreter: Yes, Hoy Sin.

Mr. Brennan: And what province?

The Interpreter: Kwangtung, or Canton, C-a-n-t-o-n, in the olden time.

Q. (By Mr. Brennan): When and where were you born?

A. I was born KS 34, 12th month, 10th day. [6]

Mr. Brennan: What is the English date for that?

The Interpreter: It is equivalent to January 1, 1909.

Q. (By Mr. Brennan): Who was your father?

A. According to phonetics, Wong Ah Hon or Hong.

Q. When you first came to the United States, how did you arrive?

A. I came by steamer to the San Francisco port.

Q. When did you arrive?

A. I remember that I left Hong Kong CR 9th month.

Q. That is the date——

Mr. Talan: What is that? Ninth month or ninth year?

The Interpreter: Excuse me. Ninth year.

(Testimony of Wong Ken Foon.)

Mr. Brennan: That is 1920 or early 1921, is that correct?

The Interpreter: That is correct.

Q. (By Mr. Brennan): How many trips have you made to China since? A. Twice, two times.

Q. On the first trip to China, when did you leave?

A. The first time I left was CR 15th year, American date, the 7th month.

The Interpreter: That would be July. CR 15 would be 1926 or early 1927.

The Court: What is the month?

The Interpreter: He said the seventh month of that year. [7]

The Court: That is July?

The Interpreter: Yes, July.

The Court: All right.

Mr. Brennan: The 15th was the CR for the year?

The Witness: Yes.

The Interpreter: That is July, 1926.

Mr. Brennan: Does he have the CR month, the Chinese month?

The Interpreter: No. He said seventh month, which is July, American seventh month.

Q. (By Mr. Brennan): How did you go?

A. By steamer, President Taft.

Q. Do you recall when you returned?

A. I returned CR 16th, either the seventh or the eighth month, from Hong Kong, according to Chinese calendar.

The Interpreter: The seventh or eighth month

(Testimony of Wong Ken Foon.)

would be the end of July, from July 29 until September 25. That would embrace the seventh and eighth months in the Chinese calendar.

The Court: Just a minute. What year?

The Interpreter: 1927.

Q. (By Mr. Brennan): How did you return, by what transportation? A. By steamer.

Q. Do you know the name of the steamer?

A. President Grant. [8]

Q. When did you leave for the second trip?

A. CR 21, about July, American date, July month.

The Interpreter: CR 21 year would be 1932 or early 1933.

Q. (By Mr. Brennan): From where did you leave? A. From San Pedro.

Q. By what means of transportation did you go?

A. By steamer.

Q. Do you remember the name of the steamer?

A. President McKinley.

Q. When did you return?

A. About CR 22 year, Chinese month seventh or eighth month.

The Interpreter: CR 22 would be 1933 or 1934.

Mr. Brennan: What month?

The Interpreter: Seventh and eighth month would be equivalent to our——

Mr. Brennan: That is the same as July to September that you gave before?

The Interpreter: In this year it would be August

(Testimony of Wong Ken Foon.)

21 until October 18th, would be within the two months.

Q. (By Mr. Brennan): How did you return?

A. By steamer.

Q. Do you remember the name of the steamer?

A. President Grant.

Mr. Brennan: At this time may we amend to conform to [9] proof on page 2, lines 13 and 14, the return shown by City of Los Angeles in the records, and the witness saying that it is the President Grant.

The Court: It may be amended.

Mr. Brennan: By interlineation, your Honor?

The Court: Yes.

Q. (By Mr. Brennan): When you were in China on your first trip, where did you go in China?

A. To the village.

Q. Is that the Nam On Village where you were born? A. Yes.

Q. Did any event occur there on that trip?

A. The first time?

Q. The first trip?

A. You mean what I saw there?

Q. Did you get married on that trip?

A. Yes. That is the time when I was married.

Q. To whom were you married?

A. Ng Shee.

Q. On what date were you married?

A. CR 15-8-22.

Mr. Brennan: What is that in the American calendar?

The Interpreter: September 28, 1926.

(Testimony of Wong Ken Foon.)

Q. (By Mr. Brennan): Do you know whether there is any record available of that marriage? [10]

A. At that time we didn't have any record of the marriage.

Q. Did you have any children issue of that marriage? A. Yes.

Q. When was the first child born?

A. Chinese calendar, CR 22-5-25.

Mr. Brennan: What year is that?

The Interpreter: It is July 17, 1933.

Mr. Brennan: There must be some mistake.

The Court: I thought there was a child born on this first trip. How many children have you?

The Witness: The first child was born CR 16.

The Court: Let's get the rest of the CR 16. 16 what?

The Witness: CR 16-5-25.

The Interpreter: That would be June 24, 1927.

Q. (By Mr. Brennan): Where was that child born? A. Nam On Village.

Q. That is the same village where you were born?

A. Yes.

Q. Was it a boy or a girl? A. A boy.

Q. What was the boy's name?

A. Wong Hing Goon.

The Court: Is that the plaintiff here?

The Witness: Yes, your Honor. [11]

Mr. Brennan: Will you just stand up?

Q. Is that the boy that was born issue of that marriage? A. Yes, he is the boy.

(Testimony of Wong Ken Foon.)

Mr. Brennan: We have identified, for the purpose of the record, the boy sitting at counsel table who is the plaintiff in the action.

Q. How old was the boy when you left China?

A. The first time?

Q. Yes. A. One or two months old.

Q. Where did you leave him?

A. At the home village.

Q. In whose house? A. Our home.

Q. Is that the same home where you were born?

A. Same house.

Q. When you left the village to return to the United States, by what port did you leave?

A. You mean from China?

Q. That's right. A. Hong Kong.

Q. Approximately how long were you in Hong Kong before you left Hong Kong?

A. Two or three weeks. [12]

Q. When you returned on the second trip, did you go to the village? A. Yes.

Q. Is that the village where you were born?

A. Yes.

Q. How long did you remain in the village on that trip? A. About 13 months or so.

Q. Did you see your son on that trip?

A. Yes.

Q. We are referring to the plaintiff in this action, the boy that stood up. You saw him on that trip? A. Yes.

Q. We are referring to the plaintiff in this ac-

(Testimony of Wong Ken Foon.)

tion, the boy that stood up. You saw him on that trip, did you? A. Yes.

Q. How old was he approximately at the time you arrived at the village?

A. About five or six years old.

Q. Where was he when you got to the village? Where was he living? A. Living at home.

Q. Where was your wife at that time?

A. Also at home.

Q. At that time you had just the one boy, that is the only child you had, is that correct?

A. You mean the time immediately after my arrival?

Q. That's right, when you got there.

A. Yes. [13]

Q. During the time that you were there, where did the boy live that 13 months?

A. The same house I lived in.

Q. When you left, was he still living in the house with his mother? A. Yes.

Q. During your second trip to China, did you have other children born of your marriage?

A. Yes, one.

Q. When was he born?

A. CR 22-4th month, 28th day.

Mr. Brennan: Is that the July 17, 1933, that you transcribed for us before?

The Interpreter: CR 22, 4th month, 28th day, would be May 22, 1933.

Q. (By Mr. Brennan): Was that a son?

(Testimony of Wong Ken Foon.)

Q. How old was that son when you left the village?

A. About three to two months old.

Q. Have you had any other children born issue of that marriage? A. No.

Q. Have you had any daughters born issue of that marriage? A. No.

Q. I show you Plaintiff's Exhibit 1 and ask you if you [14] signed the original of this document on October 6, 1927? A. That is my signature.

Q. Did you furnish the name of your wife as Ng Shee and the date of the marriage as CR 15-8-22?

A. Yes.

Q. Did you furnish at that time the answer to the question, "How many children have you ever had"? Indicating one son? Did you furnish that information? A. Yes.

Q. Did you give the name of Wong Hing Goon, age 1, sex M, and the date of birth, CR 16-5-20, location China, and "No others"? Did you furnish that information to the immigration office?

A. It was not age one year old. The one is over a month old.

Q. It says just "1" under age, but you furnished the figure 1 for the immigration office, did you?

A. I meant over one month.

Q. Referring to Plaintiff's Exhibit 2, dated 8-19-53, I will ask you if this is your signature on the bottom of that document.

A. That is my signature.

Q. You signed that where?

(Testimony of Wong Ken Foon.)

A. I suppose at San Francisco immigration.

Q. On that occasion, did you furnish them the information [15] that you were married once and your wife is Ng Shee, married her CR 15-8-21, natural feet, now living in Nam On Village, S. N. D.? Did you give them that information? A. Yes.

Q. Did you furnish them also under the name of children, the number that you have had, the figure "2," and the number of sons as "2," and the number of daughters an "None"? Did you give them that information?

A. Yes. All together, two boys.

Q. Did you tell them your wife was pregnant one month at the time you were in San Francisco and give them this information?

A. I thought she was pregnant at that time.

Q. So that you did furnish them that information? A. Yes.

Q. Did you furnish them the information under the names of children, "Wong Hing Goon, age 7, sex M, birthdate CR 15-5-25, location Nam On Village," and "Wong Hing Gin, one year, M, CR 22-4-28, Nam On Village"?

A. It should be Gim. Referring to the one year, according to the Chinese, the first year of the child, whether a full year or not, is called one year old.

Q. So that this "1" you gave them was the Chinese age, is that correct?

A. According to Chinese, it is one year, no matter how [16] many months is in the year.

(Testimony of Wong Ken Foon.)

Q. When did you next see your son after you left the village in 1933?

The Court: You say, "your son." You mean the plaintiff?

Mr. Brennan: Yes.

Q. When did you next see the plaintiff after leaving the village in 1933?

A. Until he arrived in the United States.

Q. Approximately when was that that he arrived in the United States?

A. Last year, January, he arrived into the United States.

Mr. Brennan: Counsel, are you prepared to stipulate that the American Consul issued his travel papers to come to this country without raising any objections, and it was after he arrived in the United States that the first objections were raised?

Mr. Talan: I am prepared to so stipulate.

Mr. Brennan: Do you so stipulate?

Mr. Talan: I do.

Mr. Brennan: May we have these two photographs marked as separate exhibits?

The Court: They may be marked Plaintiff's Exhibits 3 and 4 .

The Clerk: So marked, Plaintiff's 3 and 4 for identification, [17] your Honor.

(The photographs referred to were marked Plaintiff's Exhibits 3 and 4 for identification.)

Mr. Brennan: I have already shown these to counsel, your Honor.

(Testimony of Wong Ken Foon.)

Q. (By Mr. Brennan): I show you Plaintiff's Exhibit 3 for identification and ask you if you have seen that photograph before? A. Yes.

Q. Where did you first see it?

A. I took it and brought it with me.

Q. You took it from where? A. Hoy Shan.

Q. When, which trip?

A. About a month or so after my marriage.

Q. That was on your first trip? A. Yes.

Q. Do you recognize the people in the picture?

A. Yes.

Q. Who is the one on the left in the picture?

A. My wife's relation.

Q. Do you know her name or his name?

A. Ng Gin.

Q. Who is the one in the middle?

A. That is my wife. [18]

Q. What is her name?

A. Ng Shee or Ng Uey.

Q. Who is the one on the right?

A. That is I.

Mr. Brennan: I have identified them from left to right in the photograph for the purpose of the record.

Q. Where was this picture taken?

A. At Toy Shan.

Q. That is at the village, is that right?

A. Yes.

Mr. Brennan: May this be received in evidence, your Honor?

The Court: It may be received.

(Testimony of Wong Ken Foon.)

Mr. Talan: I have no objection, your Honor, to the offer except I don't think it has much probative value to establish the relationship of this plaintiff.

The Court: It may be received and marked Plaintiff's Exhibit 3.

The Clerk: So marked.

(The photograph referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

Q. (By Mr. Brennan): I show you Plaintiff's Exhibit 4 for identification and ask you if you have seen that photograph before? A. Yes. [19]

Q. When did you first see that photograph?

A. In America.

Q. Where? A. At Los Angeles.

Q. When did you first see it?

A. Shortly after the war was over.

Q. How did you get the picture?

A. My wife sent it to me.

Q. Do you have the letter or envelope or other wrapping that accompanied the picture?

A. I may have it, but it is so long ago I may have discarded it. I am not sure.

Q. Will you make a search for it this noon or tonight when you go home and see if you can find it?

A. Yes.

Q. Do you recognize any of the people in that picture? A. Yes.

Q. Do you know of your own knowledge who the figure is on the left of the picture as you look at it?

(Testimony of Wong Ken Foon.)

A. My second son, Wong Hing Gim.

Q. How do you know that is your second son?

A. My wife wrote and told me about it and the picture tells me so.

Q. Did you ever see him after he was one or two or three months old? [20] A. No.

Q. The person in the middle, who is that?

A. My wife.

Q. Do you recognize her of your own knowledge?

A. Yes.

Q. The person on the right as you look at the picture, who is that? A. My older son.

The Court: You say the older son?

The Witness: Yes.

Q. (By Mr. Brennan): Is that the plaintiff that is sitting in court at the counsel table that I just referred to? A. The same person.

Q. When you received this picture, did you recognize the boy as the boy you last saw when he was seven years old? A. I recognize him to be.

Mr. Brennan: May this be received in evidence, your Honor?

Mr. Talan: Same comment, your Honor.

The Court: Same objection and same ruling. It may be received in evidence.

The Clerk: Plaintiff's Exhibit 4 in evidence, your Honor.

(The photograph referred to was received in evidence and marked Plaintiff's Exhibit [21] No. 4.)

(Testimony of Wong Ken Foon.)

The Court: You say you got this picture after the war. About when was that, how many years ago was that?

The Witness: About six or seven years ago.

The Court: You have had this picture in your possession for the past six or seven years?

The Witness: Yes, on top of my table.

Mr. Brennan: That's all at this time of this witness, your Honor. Do you wish to reserve cross-examination?

Mr. Talan: Well, I have a few questions I would like to ask now.

Mr. Brannan: All right.

Cross-Examination

By Mr. Talan:

Q. What are the names of your father and mother?

A. My father's name is Wong Ah Hon and my mother's name is Lee Shee.

Q. Are they both living at the present time?

A. My father died. My mother is living.

Q. When did your father die?

A. About CR 37.

The Interpreter: That would be 1948 or early 1949.

Mr. Brennan: Is that the date of the death of the father?

Mr. Talan: Yes. [22]

Q. At the time of your parents' marriage, where did they live in China? A. Nam On Village.

(Testimony of Wong Ken Foon.)

Q. Does your mother still live in Nam On Village? A. No.

Q. Where does she live now?

A. According to phonetics, Ging Sen Village, also in the district of Hoy Shan.

Q. How long has she been living in Ging Sen Village? A. Since CR 23.

The Interpreter: CR 23 would be 1934 or early 1935.

Q. (By Mr. Talan): Did both your father and mother leave Nam On Village in 1934 or 1935?

A. Yes.

Q. While your parents were living in Nam On Village, did they live in the same house that you were born in? A. Yes.

Q. While they were living in that house, was the plaintiff also at any time living in the house with them? A. Yes.

Mr. Talan: Your Honor, I would like to discontinue my cross-examination of this witness at this time and reserve the right to recall him later.

Mr. Brennan: No objection.

The Court: We will take the morning recess now. We will [23] recess until 10 minutes after 11:00. Have your next witness on the stand at that time.

(Recess.)

Mr. Brennan: I will call at this time Wong Hing Goon.

WONG HING GOON

the plaintiff herein, called as a witness by and in his own behalf, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: Will you please state your name?

The Witness: Wong Hing Goon.

Direct Examination

By Mr. Brennan:

Q. Where are you living now?

A. I am living at 662 Castellar Street, Los Angeles.

Q. Where were you born? A. At home.

Q. Where is home? A. Nam On Village.

Q. In what district? A. Hoy Shan.

Q. What province?

A. Kwangtung Province.

Q. That is the same as Canton?

A. Yes. [24]

Q. When were you born?

A. Fifth month, 25th day, CR 16.

The Interpreter: June 24, 1927.

Q. (By Mr. Brennan): Now, when did you leave China? A. CR 37.

Mr. Brennan: What year is that?

The Interpreter: 37th year would be 1948 or early 1949.

The Court: Was the question, "When did you leave China"?

Mr. Brennan: Yes.

(Testimony of Wong Hing Goon.)

Q. Is that when you left China to come to the United States, or when you left the village?

A. Left the village.

Q. Where did you go after you left the village?

A. To Hong Kong.

Q. When did you leave Hong Kong?

A. 1951.

The Court: Where did you go when you left Hong Kong?

The Witness: You mean totally leave Hong Kong?

Mr. Brennan: Yes.

The Witness: 1952, I left Hong Kong for the United States.

Mr. Talan: Did he give that date in English?

The Interpreter: Yes, 1952, he said.

The Court: What is the month?

The Witness: After I arrive here several days, Chinese [25] New Year was due.

Mr. Talan: Will you translate that date?

The Witness: I think about the first month, the 15th day, is the American date, first month, 15th day, may be January 15.

Q. (By Mr. Brennan): How did you come to the United States? A. By airplane.

Q. To what port did you come?

A. You mean the way I pass through or the way I ride?

Q. When your plane came to the United States, what town did you come to?

A. Los Angeles airport.

(Testimony of Wong Hing Goon.)

Q. Did you meet anyone there?

A. The immigration was there.

Q. After you came to the United States, did you see Wong Ken Foon? A. Yes.

Q. Where was he when you first saw him?

A. When I got off the plane.

Q. That was at the International Airport, is that right?

A. I don't know the name of the airport.

Q. But it was when you came to Los Angeles, first came here at the airport, is that right? [26]

A. Yes, it is the Los Angeles airport.

Q. Do you remember seeing him any time before that in China? A. In the village.

Q. About how old were you when you saw him in China? A. About six years old, I think.

Q. When you were about six years old and you saw this same person in China, where were you?

A. You mean the first trip or the second time?

Q. When you were six or seven years old when you saw him, where was it that you saw him?

A. It was CR 21 year at that time when I was about six years old. I saw him then.

Q. Where was that?

A. At the village home.

Q. Is that the same village home where you were born? A. Yes.

Q. Is that the same village home you continued to live in until you left the village in 1947 or 1948 for Hong Kong? A. Yes.

Q. Who did you live with at that time?

(Testimony of Wong Hing Goon.)

A. You mean the family, our family?

Q. Who else was in the house when you were six or seven years old when this party was there?

A. My mother and my younger brother. [27]

Q. When Wong Ken Foon first came there, was your younger brother born at that time?

The Interpreter: First came to the village?

Q. (By Mr. Brennan): When you were six or seven years old, when your father first came to the village, at that time was your younger brother born at that time? A. Until in 22, CR 22.

Q. Was your younger brother born before Wong Ken Foon left, when you were six or seven years of age? A. Yes.

Q. Did you know or did anybody tell you who Wong Ken Foon was when he was there?

A. My mother.

Q. What did she tell you? Who did she tell you he was? A. She said that this is my father.

Q. About how long was he there on that occasion when you were six or seven years old?

A. Over 10 months.

Q. Where did he live during that time?

A. The same house.

Q. Then when he left, you didn't see him again until you came to this country, is that right?

A. That's right.

Q. I will show you Plaintiff's Exhibit No. 3 and ask you if you have ever seen that picture [28] before. A. Yes.

Q. Where did you see the picture last?

(Testimony of Wong Hing Goon.)

A. At my village home.

Q. Is this the picture or one similar to that that you saw? A. Similar to this.

Q. Where was the picture when you saw it?

A. It was hanging on the wall.

Q. Was it similar to this or the exact picture?

A. It isn't this one. The same image of this one.

Q. How old were you when you first remember seeing the picture at your house?

A. In my teens, I think.

Q. Where was it at that time when you first saw it? A. It was hung up at home.

Q. When you left the village in 1947 or 1948, when you went down to Hong Kong, where was the picture then? A. Same place.

Q. Was it there all the time from when you first remember seeing it until you left? Was it in the same place? A. That's right.

Q. Did anybody ever tell you who was in that picture, who those people were?

A. This right is my father, I was told, the center one my mother, and that is a relation. [29]

Q. Who told you that? A. My mother.

Q. When you saw Wong Ken Foon when you were six or seven years of age, did you recognize him as the man who is in the picture, Plaintiff's Exhibit 3? A. Same.

Q. And when you saw Wong Ken Foon at the airport, did you recognize who he was?

A. Through this picture, I recognize him, through the image of this picture.

(Testimony of Wong Hing Goon.)

Q. Did you recognize him as the same person you saw when you were six or seven years of age?

A. Same man.

Q. Have you known him as your father from the time you were six or seven years of age when you first met him up until the present time?

A. Yes.

Q. What is your mother's name?

A. Ng Shee.

Q. Where is she now?

A. Now she is living in Hong Kong.

Q. When did she go to Hong Kong?

A. CR 37, about the 8th month.

The Interpreter: CR 37 would be 1948; 8th month would be September or October. [30]

Q. (By Mr. Brennan): Was that when you went to Hong Kong? A. No.

Q. Did she go to Hong Kong before you went or after you did? A. I was ahead of her.

Q. Then did she continue to stay in Hong Kong with you until you left to come to the United States?

A. You mean the early part or the latter part?

Q. Did she go back to the village after she got to Hong Kong? A. No. She never went back.

Q. Then she stayed in Hong Kong until you left to come by plane to the United States, is that right? A. Yes.

The Court: May I ask a question?

Mr. Brennan: Yes, your Honor, certainly.

(Testimony of Wong Hing Goon.)

The Court: How long was your mother in Hong Kong before you left for the United States?

The Witness: You mean whether she live with us or she live in Hong Kong?

The Court: In Hong Kong?

The Witness: I think about two years.

The Court: During this two-year period, was your younger brother with your mama? [31]

The Witness: Yes.

The Court: Did your mother and younger brother live in the same house with you in Hong Kong?

The Witness: Not in the beginning.

The Court: How long did you live separate from your mother in Hong Kong?

The Witness: 1950, we live together, from 1950.

The Court: From 1950. You said your mother went to Hong Kong in 1948, September or October. Did she live separate from you in Hong Kong for approximately two years?

The Witness: Yes, separately.

The Court: Where did you live when you were in Hong Kong?

The Witness: I live at my father's friend's home.

The Court: You lived in your father's friend's home until your mother came to Hong Kong, and then for approximately two years, is that right?

The Witness: Yes.

The Court: When your mother commenced to

(Testimony of Wong Hing Goon.)

live with you, did your younger brother also live with you?

The Witness: Yes.

The Court: And where did you live?

The Witness: At that time four of us live together. After my marriage, my wife live with us, too.

The Court: Where? [32]

The Witness: Name is the Morlor Har Street, No. 54, third floor, Hong Kong.

The Court: Where did your mother live during the two years she didn't live with you?

The Witness: She was living in Kowloon.

The Interpreter: Just across the bay from Hong Kong.

The Court: Did you get married while you were in Hong Kong?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Brennan): Up until the time you left the village to go to Hong Kong, did your mother and you live together in the same house all the time?

A. Yes.

Q. When the person you referred to as your father, Wong Ken Foon, came to the village when you were six or seven years old, where did he live?

A. Same house.

Q. That was true of all the time he was there, the months he was there, is that right?

A. Yes, same house.

Q. I show you Plaintiff's Exhibit 4 and ask you

(Testimony of Wong Hing Goon.)

if you know who is in that picture? A. Yes.

Q. Who is on the left as you look at the photograph? [33] A. My younger brother.

Q. Who is in the middle? A. My mother.

Q. Who is on the right as you look at the picture?

A. This is I.

Q. Referring to Plaintiff's Exhibit——

The Court: Before we leave this other picture, when was that photograph taken?

The Witness: After the war.

The Court: How many years ago?

The Witness: Six or seven or eight years.

The Court: Where was it taken?

The Witness: At Hoy Shan.

The Court: Is that Hoy Shan Village or Hoy Shan Province?

The Witness: Hoy Shan is a little town just like over here. In China, sort of a market place.

The Court: After the picture was taken, did you get any prints of the picture?

The Witness: One at home. We have one at home.

The Court: How old were you when that picture was taken?

The Witness: About 18.

The Court: Did you send that picture to anyone or send a picture like that to anyone?

The Witness: Not me.

The Court: All right. [34]

Q. (By Mr. Brennan): Is the woman shown in

(Testimony of Wong Hing Goon.)

Plaintiff's Exhibit 3 and the woman shown in Plaintiff's Exhibit 4 the same woman?

A. Same person.

Q. That is your mother in both cases, is that right? A. Yes.

The Court: Did you ever see this picture in China?

The Witness: Yes.

The Court: Where?

The Witness: At my home.

The Court: Was there more than one picture?

The Witness: At home, we only have one copy hung on a wall.

The Court: It is hung on a wall?

The Witness: Yes.

Mr. Brennan: May the record show his Honor was showing the witness Plaintiff's Exhibit 3?

I believe that's all, your Honor, of this witness at this time.

Cross-Examination

By Mr. Talan:

Q. Where were you born?

A. Nam On Village, Toy Shan, Kwangtung.

Q. Were you born in a house in that [35] village? A. I was born at home.

Q. Just where in that village was your home?

A. You mean to say what lot, or something like that?

Q. Yes. Will you describe where your house was located in that village?

(Testimony of Wong Hing Goon.)

A. 5-6-5, meaning section 5, row 6, and the fifth house.

Q. In other words, your house was the——

A. Sixth row, the fifth house.

Q. Fifth house in the sixth row? A. Yes.

Q. That is counting from which direction as far as the rows are concerned? A. From the west.

Q. Sixth row from the west and the fifth house in the sixth row?

A. The fifth house on the sixth row.

The Court: May I ask a question? How many houses were in this village?

The Witness: About 40-something.

The Court: 40 houses?

The Witness: Yes.

The Court: How many rows were there?

The Witness: About nine rows.

The Court: Was there a head or tail to the village? [36]

The Witness: The head of the village is from the west, on the west.

The Court: On the west side is the head of the village, is that right?

The Witness: Yes.

Q. (By Mr. Talan): As long as you can remember, did you live in the same house until you left the village some time in 1948? A. Yes.

Q. As far as you can recall, who else lived in the house with you there in Nam On Village?

A. As far as I remember, my grandfolks used to

(Testimony of Wong Hing Goon.)

live there, my mother and father lived there, and my brother and myself.

Q. Did anybody else ever live in this same house while you were living there?

A. My grandfolks were there.

Q. Any other relatives besides your grandparents? A. No.

Q. Will you state who lived in the house with you from the time you were born until the time you left the village?

A. The same persons that I mentioned.

Q. Will you repeat the relationship?

A. My grandparents, my mother, my younger brother and myself. [37]

Q. And no one else?

A. And my father, too.

Q. Did an aunt and her two children ever live in the same house with you?

The Interpreter: I have to ask mother's side or father's side? Then I can use the right word.

Mr. Talan: Father's side.

The Witness: Not that I remember, not that I recall.

Mr. Talan: Will you mark this Defendant's Exhibit A for identification?

The Court: It may be marked Defendant's Exhibit A for identification only.

The Clerk: So marked, Defendant's Exhibit A for identification.

(The exhibit referred to was marked Defendant's Exhibit A for identification.)

(Testimony of Wong Hing Goon.)

Q. (By Mr. Talan): Referring to Defendant's Exhibit A for identification, which is a copy of a transcript of a hearing held before a Board of Special Inquiry on February 15, 1952, at San Pedro, do you remember being asked at that time with respect to the house in the village, the Nam On Village where you lived, the following question:

"Q. Who occupied that house when you last lived there"? [38]

And giving the following answer:

"A. My younger brother, Wong Hing Gin, my mother and I occupied the big door side. My No. 1 uncle Wong Ken Fook's wife, Lee Shee, and their son, Wong Soo Ting, and their daughter, Wong Shew Fung, occupied the small-door side."

A. Yes.

Q. Is your answer yes, you did make this statement? A. Yes.

Q. This statement appears on page 5 of Defendant's Exhibit A for identification.

Directing your attention again to Defendant's Exhibit A for identification, I again ask you with reference to the——

Mr. Brennan: What page, counsel?

Mr. Talan: Page 6.

Q. I again ask you whether at the time of this hearing before the Board of Special Inquiry in San Pedro on February 15, 1952, you were asked the following question:

"Q. Who is now living in your native house in Nam On Village"?

(Testimony of Wong Hing Goon.)

To which you gave the following answer:

"A. The big-door side is now vacant. The small-door side is still occupied by my aunt, Lee Shee, and her two children."

A. Are you referring to the house I was living in? [39]

Mr. Talan: The question asked about his native house.

The Witness: I was confused with the question at that time.

The Court: How were you confused?

The Witness: I don't understand the question.

The Court: May I ask a question. This house in which you lived, it had a big door and a small door?

The Witness: Yes.

The Court: Was there a dividing line or a partition between the side with the big door and the side with the small door?

The Witness: There is no partition, but each side has his own bedroom.

The Court: When you talk about the house in which you lived, did you talk about the whole house, both sides of the house?

The Witness: As far as I know, in the olden time my grandfolks lived in that house, but no other person lived in that house.

The court: Which is the true statement? Was your aunt living in the house or not?

The Witness: No.

The Court: Your testimony is now nobody lived in the house except your grandfather, your grand-

(Testimony of Wong Hing Goon.)

mother, your mother, and your father and you and your brother? [40]

The Witness: The truth is that the grandfolks and my parents and my brother and I lived in that house only.

The Court: Well, I notice it's 12:00 o'clock. I assume you are going to another part of the transcript?

Mr. Talan: Yes, I am, your Honor.

The Court: We will recess now until 2:00 o'clock this afternoon.

(Whereupon, an adjournment was taken to 2:00 p.m.) [41]

March 24, 1953—2:00 o'Clock P.M.

The Court: Proceed.

WONG HING GOON

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified, through the interpreter, further as follows:

Cross-Examination
(Continued)

By Mr. Talan:

Q. Referring to page 6 of Defendant's Exhibit A for identification, which is a transcript of the hearing before the Board of Special Inquiry of the Immigration Service held on February 15, 1952, in San Pedro, California, I ask whether you made this

(Testimony of Wong Hing Goon.)

statement under oath in response to the following question:

"Q. Has Lee Shee, the wife of Wong Ken Fook, always lived in your house ever since you can remember? A. Yes."

A. The daughter and the son lived at our side, but Lee Shee lived in her place.

Q. Did the children of Lee Shee live in the same house where you were living?

A. On the big door side. [42]

Q. Where did their mother live?

A. In the house of the right big door, the right of the big door.

Q. Was this in the same house where you were living?

A. Not in the house, but on the other side, the right side of the big door.

Q. Who lived on the other side of the big door?

A. My aunty.

Q. Did she live there by herself?

A. She lived there because my uncle is over here.

Q. But she lived there without her children? Were her children in the same house where you were living?

A. Sometimes our side, sometimes their side.

Q. Was this all in the same house? Is this the same house where you were living?

A. Not always on our side.

Q. Will you again name who lived in the house with you during all the time that you lived in Nam

(Testimony of Wong Hing Goon.)

On Village?

A. You mean the permanent residents?

Q. All members of the same household.

A. For permanent residents is my papa, my mama, and my brother.

Q. Who else lived there from time to time?

A. You mean the relations and relatives?

Q. Any other person. [43] A. No.

Q. Will you explain that answer?

A. Formerly my grandfolks and our immediate family, and recently, later on, the children of my uncle.

Q. Can you give us some dates as to when these persons were living in the house with you?

A. After I left for Hong Kong, my mother told me about them coming over.

Q. Prior to the time you left for Hong Kong, when you were still living in the house in Nam On Village? A. Yes.

Q. In other words, no relatives other than your grandparents, your mother, your father and your brother, ever lived in the same house with you in Nam On Village? A. Yes.

Q. Yes, nobody else lived in the same house?

The Interpreter: No one lived in the same house.

Q. (By Mr. Talan): I direct your attention to page 6 of Defendant's Exhibit A for identification and ask whether or not you made the following statements under oath in response to this question:

"Q. Were her two children, Wong Shew Fung

(Testimony of Wong Hing Goon.)

and Wong Soo Ting, both born in the same house in which you were born?"

A. They didn't say Wong Soo Ting. The name is not [44] right. Wong Shew Ming and Wong Shew Ching are the two names.

Q. Did you give that answer to that question?

A. I meant that they were both in Nam On Village, so I said yes.

Q. Referring to page 6 of Defendant's Exhibit A for identification, I ask you whether you made this statement under oath in response to this question:

"Q. Have Wong Soo Ting and Wong Shew Fung always lived in the same house with you ever since you can remember? A. Yes."

A. At times they do come over to my place and be with us.

Q. Why did you say they always lived in the same house?

A. I assumed that they meant once in a while.

Q. I direct your attention to page 10, Exhibit No. 1, of Exhibit A, and ask whether you made the following statement under oath in response to this question:

"Q. Give the family of your first uncle, Wong Ging Fook, and where they live now."

To which you answered:

"A. His wife is Lee Shee. They have two sons, one daughter. The oldest son is Wong Soo Min. During the second World War he went to Chi Kaing Province and has never returned. The [45] younger

(Testimony of Wong Hing Goon.)

son is Wong Soo Ting, the daughter is named Wong Shew Fung. They were born in Nam On Village and are still living there; that is, with the exception of the oldest boy; they live in the same house we live in, the fifth house, sixth row."

A. Yes.

Q. During the time you were living in Nam On Village, who lived in the fifth house, fifth row in the village? A. Ging Fook.

Q. What's that? A. Wong Ging Fook.

Q. Who is Wong Ging Fook?

A. My older uncle.

Q. Who lived there in the house with him?

A. His wife.

Q. Anybody else?

A. Second son and daughter.

Q. Did the second son and daughter live in any other house in the village?

A. They have lived in our house.

Q. During what years did they live in your house?

A. What year? I don't remember. Whenever they felt like coming over to be with us and to have company.

Q. Did they sleep over there? [46]

A. Sometimes.

Q. Was that a permanent proposition or would they just come over for a night or so and stay temporarily? A. Not permanent nature.

Q. I show you Exhibit 9, which is attached to

(Testimony of Wong Hing Goon.)

Defendant's Exhibit A for identification, and ask you——

Mr. Brennan: I didn't get the question.

Mr. Talan: It is attached to it. It is Exhibit 9.

Q. I ask you whether you have ever seen that before? A. Yes.

Q. Will you tell us what that is?

A. I drew this.

Q. Can you tell us when you drew this?

A. I think at San Pedro immigration.

Q. Was that somewhere around January, 1952?

A. About that time.

Q. Will you tell us what that is supposed to represent? A. The description of Nam On Tuen.

Q. Will you tell us how many rows of houses appear in this diagram? A. Nine.

Q. Wouldn't you say there are 10 rows of houses there?

A. If you count this space here, then it is 10, but if you count the unit of the structure like this —if you count [47] from here, it is nine.

Q. Isn't this a row of houses in the village?

A. According to the alleys, there are nine. There are nine alleys.

Q. How many rows of houses are there?

A. If you include this single one, it is 10.

Q. It is in a row other than the others, isn't it?

A. Yes. It is a small house here.

Q. You would say, then, there are 10 rows of houses in Nam On Village?

A. If you include this little one, it is 10.

(Testimony of Wong Hing Goon.)

Q. Is there any reason why the little house should be excluded? It is part of the village, is it not?

A. If you add it, it is 10. I put 10 here.

Q. But earlier today you testified there are only nine rows of houses?

A. I am talking about the alleys in between the houses, one, two, three——

Q. It isn't your understanding when houses are referred to that alleys are meant, is it?

The Interpreter: The two words are very similar in Chinese.

The Court: I'm sorry. I am supposed to hear this. You will have to speak louder. You are not just talking to the attorney. What was it? [48]

Mr. Talan: I asked whether or not when he refers to houses, does he take that to mean alleys?

The Witness: You asked me about the rows and columns and I answer you according to the alleys that are in between.

The Interpreter: The two words are very similar.

Mr. Talan: Who lived in this house? I am now pointing to row 5, fifth row appearing on Exhibit 9 attached to Defendant's Exhibit A for identification.

The Witness: This one, you mean?

Q. (By Mr. Talan): Yes.

A. Whose house is it?

Q. Who lived there? A. Wong Ken Fook.

Q. Who is Wong Ken Fook?

(Testimony of Wong Hing Goon.)

A. My uncle, paternal uncle.

Q. Pointing to the fourth house in row 6 in Exhibit 9 attached to Defendant's Exhibit A for identification, I asked you who lived in that house while you were living in the village of Nam On?

A. Madam Sai Ho.

The Court: May I ask a question?

Mr. Poy: Your Honor, the defendant didn't say madam. He said Aunty Sai Ho.

The Interpreter: It could be both ways.

Mr. Brennan: Who is this, your Honor? [49]

Mr. Talan: This is Mr. Poy, an interpreter, and he is up here to assist us. He couldn't get here any sooner.

The Court: He is an interpreter for the immigration authorities. May I ask a question here? What is the difference between the diagrams where you have got one division and where you have got three divisions? What's the difference?

The Witness: Each square represents one unit of a house.

The Court: One unit of a house. Would you call that two houses or one house?

The Witness: Two houses.

The Court: You call it two houses.

The Witness: Call it two houses, and this one is four.

The Court: And this up here divided into four parts, you call that four houses?

The Witness: That's right.

(Testimony of Wong Hing Goon.)

The Court: Is there any alley way or roadway between the different houses?

The Witness: It is closely together.

The Court: Would you say that is all one building? Is that four houses in one building?

The Witness: They are individual houses.

The Court: They are individual houses?

The Witness: Yes.

The Court: Down here, are these individual houses where [50] it is divided into just two halves?

The Witness: They are right adjacent to each other, built together.

The Court: But they are separate houses?

The Witness: Yes, separate houses.

The Court: Where is the head of the village here?

The Witness: The west side.

The Court: Where is your house? Where is the house you lived in?

The Witness: This is our house.

The Court: There are three houses there right together, is that right?

The Witness: Yes.

The Court: And you called that the fifth house on the sixth row?

The Witness: Yes.

The Court: Where is the fifth house on the fifth row?

The Witness: This.

Mr. Brennan: For the record, you'd better iden-

(Testimony of Wong Hing Goon.)

tify that one has a little X in it at the top of the diagram above the figure 5.

The Court: May I ask the District Attorney a question? You are using a transcript here. I understand that this plaintiff had permission to come to the United States. After he got here to the United States, was there a hearing at San [51] Pedro to determine whether or not he should be admitted?

Mr. Talan: That's right, your Honor.

The Court: And this is the transcript that was made at that hearing?

Mr. Talan: There was a preliminary hearing and then there was a hearing before the Board of Special Inquiry. At that time the transcript of the preliminary hearing was incorporated as an exhibit to the transcript of the hearing.

The Court: So you have got a transcript of the preliminary hearing?

Mr. Talan: Yes.

The Court: And a transcript of the regular hearing?

Mr. Talan: Yes.

The Court: Is that a regular transcript?

Mr. Talan: It is a certified copy.

The Court: I mean by that, did a stenographer take down the questions and answers and transcribe them?

Mr. Talan: Yes, sir.

The Court: Then what happened after the hearing?

(Testimony of Wong Hing Goon.)

Mr. Talan: Well, then there was, I think, a motion to reopen the hearing. I believe it was denied. Then there was, I believe, an appeal taken to the Commissioner and the appeal was dismissed.

The Court: Was that hearing for the purpose of establishing the citizenship of this plaintiff? [52]

Mr. Talan: That's right. The original hearing was that. He claimed citizenship.

The Court: After that appeal had been disposed of or dismissed, then this action was filed?

Mr. Talan: There was another one taken to the Board of Immigration Appeals. That was turned down there. All the administrative remedies were exhausted.

The Court: And then, subsequently, this action was filed?

Mr. Brennan: That's right. My predecessor counsel, if there was a counsel, handled it. I came in only on the court action that I filed. I was not present at the hearings. However, I have a copy and I am familiar with what happened.

The Court: I wanted to be sure this was a transcript of testimony. Sometimes we get summaries.

Mr. Talan: This is a transcript of the hearing that took place before the Board of Special Inquiry at San Pedro in 1952.

The Court: All right, you can proceed.

Mr. Brennan, before you proceed, there was a hearing there and he was turned down. Do you have any objection to having the reason that he was turned down go in the record?

(Testimony of Wong Hing Goon.)

Mr. Brennan: No. I am perfectly willing for whatever the transcript shows, the findings of the Board, to be revealed to your Honor for whatever it is worth. I have no reason to withhold that from the court. [53]

The Court: Then I will ask why was the application turned down. On what theory, on what grounds?

Mr. Talan: There was a reasonable basis for concluding that he has not had the relationship to this American citizenship, the relationship that he claims.

The Court: That is a conclusion, I guess. What was the reason for coming to the conclusion? What does your transcript show that you think is not right?

Mr. Talan: This applicant, upon being questioned, was very unfamiliar with the members of his immediate household, the neighbors surrounding the house where he lived for 21 years, where he spent his childhood, his boyhood, could give no names of the adjoining neighbors, abutting neighbors. There were discrepancies in the testimony as given by the claimant and his father.

The Court: Is this relative to the village?

Mr. Talan: Yes.

The Court: In other words, your whole case or your theory was that he was not familiar with the village, is that correct?

Mr. Talan: He was so unfamiliar with the village it would be unreasonable to give credence to the claim that he has made.

(Testimony of Wong Hing Goon.)

The Court: That is your discrepancy, that he was not familiar with the village in which he was supposed to live? [54]

Mr. Talan: He normally would be expected to know those things if his claims were true.

The Court: Were there any other discrepancies other than locations of buildings in the village?

Mr. Talan: There was one material discrepancy as to a neighbor of the village. He knew very few of the neighbors, but one name he did give. He gave certain testimony with respect to that individual, claiming that he knew him, because this person was a bachelor slightly older than he is, and he visited with him constantly.

On the other hand, his father, naming the same man, said he was a married man and lived in this house with his family and was a man in his late forties, almost fifty years of age, and that was considered a material discrepancy.

This plaintiff knew very little about anybody in the village and what little he knew was found to be discrepant.

The Court: When did this hearing take place?

Mr. Talan: The preliminary hearing was in late January, 1952, and the hearing before the Board of Special Inquiry was on February 15, 1952.

The Court: Then there was an application to reopen?

Mr. Talan: There was a motion made to reopen the hearing.

(Testimony of Wong Hing Goon.)

The Court: Did the motion give what they wanted to supply? [55]

Mr. Talan: Yes, there was some reliance made on the documents submitted to the State Department, but in view of the lack of knowledge of this petitioner, it was considered whatever documents he might have would be very unlikely to overcome the testimony that he gave.

The Court: All right. You can proceed. I just wanted to know what you had in your record that you thought was important.

Q. (By Mr. Talan): Directing your attention to Exhibit 9 attached to Defendant's Exhibit A, I will ask you again who resided in the fourth house, sixth row, of this diagram?

A. It is a woman who is in the same village. We call her Sai Hon Moo.

Q. Was he married? A. Yes.

Q. Did her husband live there with her?

A. Her husband died.

Q. Were there any children living with her in that house? A. She has a son.

Q. What is his name? A. Ben Jong.

Q. Was he living in the house with her while you lived in the village?

A. The son works at Toy Shan and he sometimes return [56] home, sometimes did not.

Q. Directing your attention again to Exhibit 9 attached to Defendant's Exhibit A for identification, I will ask you who lived in the first house of the seventh row, and point to it?

(Testimony of Wong Hing Goon.)

A. Wing Yen.

Q. During all the time you lived in the village, did this person live in that house? A. Yes.

Q. Directing your attention once more to Exhibit 9 attached to Defendant's Exhibit A for identification, I will ask you who lived in this house in the tenth row? A. A man, Wah See.

Q. Did he live there all alone?

A. And wife.

Q. Any children?

A. Two daughters who were married.

Q. Did they have any family living there with them?

The Court: Wait a minute. He meant they had daughters, but they were married, but not living there necessarily.

Q. (By Mr. Talan): I am interested in knowing who was living there.

A. The daughters don't live there.

Q. How old was this man who lived in this house? A. About 50 something. [57]

Q. Did you ever visit with him in that house?

A. I seldom go to anybody's home.

Q. Was there any other individual with the same name as that man living in the village during the time you lived there?

The Court: What's that again?

Q. (By Mr. Talan): Was there any other person with the same name as that man living in the village during the time you lived in the village?

A. No other similar name.

(Testimony of Wong Hing Goon.)

Q. Pointing to the fourth house in the seventh row appearing in Exhibit 9 attached to Defendant's Exhibit A for identification, I ask you who lived in that house during the time you were living in the village? A. It is a lot without a house.

Q. In other words, this is a vacant lot?

A. It is a vacant lot.

Q. Were there any other vacant lots in the village during the time you lived there?

A. Here is a vacant lot (indicating).

Q. Were there any others?

Mr. Brennan: Let's see where he is pointing.

Mr. Talan: He is pointing to the fourth lot in row 5.

Mr. Brennan: Marked vacant lot.

Mr. Talan: It is marked a vacant lot. [58]

Q. (By Mr. Talan): Were there any other vacant lots?

A. There were some vacant homes, houses.

Q. Where were they? Will you point them out one by one?

Mr. Brennan: I object to the question; indefinite as to when or what period of time they may have been vacant.

Mr. Talan: I will correct that.

The Court: While he was living there in the village. Conditions don't change in China as fast as they do here.

Mr. Brennan: You are one up on me on that, your Honor.

Mr. Talan: He is now pointing to the house, lot

(Testimony of Wong Hing Goon.)

3, row 3, appearing in Exhibit 9 attached to Defendant's Exhibit A.

The Court: Is that supposed to be a vacant lot?

Mr. Talan: A vacant house.

He now is marking the third house in row 8 in the same exhibit.

Q. Those are all the vacant houses that you know about during the time you lived in the village?

A. Yes.

Q. What other persons did you know in the village besides those you have already mentioned?

A. I know some.

Q. What are the names of these other people you know?

A. You mean who lives in which house?

Q. We will get to that. I would like to know first [59] which people you know?

A. The first house, the first row, Don Suen lived there.

Q. How long did you know him?

A. When I was from my teens to 20 years old, my mother told us that this person lives there, identified this person to us.

Q. Didn't you know of your own knowledge who that was? A. Yes.

Q. I don't quite follow that response. Did you know of your own knowledge who that person was?

A. My mother told me about him and I knew him.

Q. When did your mother tell you about him?

(Testimony of Wong Hing Goon.)

How old were you at the time when your mother told you about him?

A. Oh, when I was up from my teens to 20 years old and when we used to go places, and we met this man and my mother said, "This is Mr. So-and-So."

Q. And from that time you knew it was this man that your mother described to you that lived in this first house in the first row in the village?

A. Yes. I think he lived there for a long time, perhaps, but I know that this person lived in this house.

Q. What other persons did you know in the village while you were living there?

A. And Dong You or Yew lives here. [60]

Mr. Talan: He is pointing to the third house in the sixth row.

Q. How long did that person live in that house?

A. I don't know how long. Since we were born and we knew how to talk, he has been living there.

Q. In other words, ever since you can remember, this Wong Dong You lived in this house? I am pointing to the third house in row 6. A. Yes.

Q. What other persons did you know while you lived in the village?

A. This house here, Wong Nguen Doon.

Q. Pointing to the first house in row 6 on the diagram. Did you know any other persons in the village while you lived there?

A. Wah Qwoon.

Q. How many families lived in the village while you were growing up? A. About 40 or more.

(Testimony of Wong Hing Goon.)

The Court: Of the 40 or more families, how many did you know personally?

The Witness: In the same village, we all practically know each other.

The Court: Did you know all these families, where they lived? [61]

The Witness: Yes.

The Court: How many children were in the village of about your age?

Mr. Brennan: What age is your Honor referring to?

The Court: About his age.

Mr. Brennan: At what time?

The Court: At the time he was growing up, how many children were there?

The Witness: I know several, about three or more. Some of them left for other places.

The Court: Didn't you know all the children in the village about your own age?

The Witness: Those that were born and went to the Toy Shan town to live or to stay, I wouldn't know those.

The Court: Whom did you play with when you were in the village growing up? Did you have any playmates?

The Witness: When we were in the village, the two brothers of us, we were attending school and we seldom go out to do much playing.

The Court: Did you know the other children in the village?

(Testimony of Wong Hing Goon.)

The Witness: You mean the little children I mentioned? You want the names of those children?

The Court: I want to know who your playmates were. With whom did you play in the village? [62]

The Witness: Wong You Ken is one. Wong Shee Shew Sin, Wong You Fong. I ordinarily associated with these few and my own kid brother, younger brother.

The Court: What house did the first one live in?

The Witness: Row 2, house 6.

Mr. Brennan: In view of the question as to what a row is and what are houses, can it be pointed out?

The Court: He knows what he is doing about the rows and houses. Where did the second boy live?

The Witness: The third one below.

The Court: This was the second boy now.

The Interpreter: He meant the third house on the sixth row.

The Witness: Yes, the third house on the sixth row.

Mr. Brennan: Is that the first one?

The Court: The last boy, where did he live?

The Witness: Seventh row, the first house.

The Court: You didn't play with anybody except these three boys, is that right?

The Witness: Sometimes with my aunt's son, Shew Tin.

The Court: Where did he live?

The Witness: He is the son of my paternal uncle. The opposite side of the big door.

The Court: Lived in your home?

(Testimony of Wong Hing Goon.)

The Witness: Occasionally he came over to our home. [63]

The Court: These are the four boys you played with while you were growing up?

The Witness: Yes.

The Court: I notice it's 3:00 o'clock. I think we'd better take our afternoon recess.

Mr. Talan: Judge, just before we do, may I ask him this?

The Court: Yes.

Q. (By Mr. Talan): Were those playmates of yours still in the village when you left in 1948?

A. Yes.

The Court: We will now recess until 15 minutes after 3:00.

(Recess.)

The Court: You may proceed.

Mr. Talan: Your Honor, with your leave, we would like to substitute Mr. Poy as interpreter from here on in.

Mr. Brennan: We followed the procedure the government said we had to follow. We picked from their own panel an interpreter, and I don't know why we should change to somebody who is employed by the Immigration Service.

The Court: I don't know any necessity for changing the interpreter. As far as I know, this interpreter is doing a good job.

Mr. Talan: We won't insist on it then. [64]

Q. Directing your attention to page 7 of De-

(Testimony of Wong Hing Goon.)

fendant's Exhibit A for identification, I will ask you whether or not——

Mr. Brennan: Before you proceed, counsel, you referred to page 10, and I notice there are two page 7's and two page 10's. Are you referring to the first 7?

Mr. Talan: The first 7.

Mr. Brennan: May the record show the page 10 you referred to, however, was out of the second?

Mr. Talan: Yes. I thought I made that clear, Mr. Brennan.

Q. I refer to page 7 of Defendant's Exhibit A for identification and ask whether or not you made the following statement under oath in response to this question:

"Q. When you were last in Nam On Village, who occupied the fourth house of your row; in other words, the house directly in front of yours?

"A. I don't remember."

A. You mean the one further down?

Q. No.

The Court: Just read the question and ask him if he didn't answer that way.

The Witness: Yes.

Q. (By Mr. Talan): Referring to that same exhibit, same page, I will ask you whether or not you gave the following answer [65] under oath to this question:

"Q. Did anyone occupy that house?

"A. Yes."

A. Yes.

(Testimony of Wong Hing Goon.)

The Court: Is this the vacant lot we are talking about?

Mr. Talan: No. This is the house in which he testified he knew the occupant. Your Honor, this witness has just testified that in the fourth house, sixth row, the one he was asked about at the immigration hearing, San Ho Moo lived in that house and her husband died, she has one son, sometimes home, sometimes not.

Q. Referring to the same exhibit, I will ask you whether you gave this answer under oath to this question:

"Q. Are you positive someone lived in that house when you were last in Nam On Village?"

To which you answered: "Yes."

A. Yes.

Q. I direct your attention to the same exhibit, page 7, and ask you whether you gave the following answer under oath to this question:

"Q. How many people lived there at that time?

"A. I don't remember."

A. Yes.

Q. I direct your attention to the same exhibit, page 7, [66] and ask you whether you gave the following answer under oath to this question:

"Q. To whom did that house belong during the years that you lived in that village?

"A. I don't know whether his name is Wong Dung You or not."

A. Yes.

Q. I direct your attention to the same exhibit,

(Testimony of Wong Hing Goon.)

page 7, and ask whether you gave the following answer under oath to this question:

"Q. What family did Wong Dung You have living there?

"A. I just remember he had a wife living there. I don't know whether they had any children or not."

A. Yes.

Q. I direct your attention to page 7 of the same exhibit and ask whether you gave the following answer under oath to this question:

"Q. What was his wife's name?

"A. I don't know."

A. Yes.

Q. I direct your attention to page 7 of the same exhibit and ask whether you gave the following answer under oath to this question: [67]

"Q. Are you positive that his name was Wong Dung You?

"A. There is a person in our village by the name of Wong Dung You, but I am not sure whether he lived in this house or not."

A. Yes.

Q. I direct your attention to page 7 of the same exhibit and ask whether you gave the following answer under oath to this question:

"Q. According to your testimony, you lived in this same village, in the house in which you were born, from the time of your birth until CR 37 (1948), or a total of 21 continuous years. Now you tell us that you are unable to state who lived in the

(Testimony of Wong Hing Goon.)

house right next to yours during that time. Do you expect us to believe that statement?

"A. I never paid attention to other people in the village. I just know our own house and the household members."

A. Yes.

Q. I direct your attention to page 8 of the same exhibit and ask whether you gave the following answer under oath to this question:

"Q. Who occupied the third house in your [68] row when you were last in Nam On Village?

"A. Like I told you before, I don't remember anybody's name in that village."

A. Yes.

Q. I direct your attention to page 8 of the same exhibit and ask whether or not you gave the following answer under oath to this question:

"Q. When you were last in Nam On Village, who occupied the second house of your row?

"A. I don't remember the people's names in the village. There are forty somewhat houses; I can barely draw it out; I cannot remember their names."

A. Yes.

Q. I direct your attention to page 8 of the same exhibit and ask whether or not you gave the following answer under oath to this question:

"Q. When you were last in China, who occupied the fourth house, located on the fifth lot, in the fifth row, counting from the head. In other words, the house directly west of your house?

"A. I want to repeat what I said a while ago

(Testimony of Wong Hing Goon.)

again, that I don't remember anybody's name in the village." [69]

A. Yes.

Q. I direct your attention to page 8 of the same exhibit and ask whether you gave the following answer under oath to this question:

"Q. When you last lived in Nam On Village, who occupied the third house on the third lot of the fifth row, counting from the head?

"A. I really don't know anybody's name in the village. I can just draw that village and that is all."

A. Yes.

Q. I direct your attention to page 8 of the same exhibit and ask whether you gave the following answer under oath to this question:

"Q. When you were last in Nam On Village, who occupied the second house of the fifth row?

"A. I don't know the name of any member of the village except the person who owned the house at the tail end of the village; that was a small house, and I remember something about that social hall."

A. Yes.

Q. I direct your attention to page 8 of the same exhibit and ask whether or not you gave the following answer to this question: [70]

"Q. You mean you know the occupants of the single house standing by itself in the tenth row of that village?

"A. I don't know the one you meant. The one I meant is at the tail end, counting from the west;

(Testimony of Wong Hing Goon.)

that would be on the east side; and that belongs to Wong Wah See."

A. Yes.

Q. I direct your attention to page 8 of the same exhibit and ask whether or not you gave the following answer under oath to this question:

"Q. How do you happen to remember the owner of that house when you can't remember the owners of the houses next door to yours?

"A. He is a bachelor, that lives in that little house, just a little bit older than I am so I visited him all the time."

A. Yes.

Q. I direct your attention to page 8 of the same exhibit and ask whether you gave the following answer under oath to this question:

"Q. When you were last in Nam On Village, who occupied the fourth house of the seventh row, counting from the head?

"A. There is a person in our village by [71] the name of Wong Sai Koon, but I don't know whether he lives in that house or not."

A. There is no Wong Sai Koon.

Q. Did you or did you not give that answer?

A. I made an answer, but not Wong Sai Koon.

Q. Do you recall what answer you did give, what name you did give?

A. There is no Wong Sai Koon.

Q. Referring to page 9 of the same exhibit, I ask you whether you gave the following answer under oath to this question:

(Testimony of Wong Hing Goon.)

"Q. Do you know anyone else in that village other than Wong Wah See and Wong Sai Koon?

"A. I just remember one other name, Wong Sai Wing."

A. Yes.

Q. I direct your attention to page 9 of the same exhibit and ask you whether you gave the following answer under oath to this question:

"Q. Where did he live?

"A. He lived near the head or west side of the village; I don't know which house."

A. Yes.

Q. I direct your attention to page 9 of the same exhibit and ask you whether you gave the following answer to the following question: [72]

"Q. Do you mean to say that you lived 21 years of your life in your house in Nam On Village and can't tell us positively who occupied the house connected to it with a common wall, when you only left there four years ago?

"A. There are so many houses in the village, I just can't remember."

A. Yes.

Q. I direct your attention to Plaintiff's Exhibit 3 and ask you when was the first time you ever saw a facsimile of that picture in your house in Nam On Village?

A. At my Nam On home; it has been there a long time. I don't remember when.

Q. How old were you when you first recall seeing

(Testimony of Wong Hing Goon.)

a picture like this on the wall of your house in Nam On Village?

A. About eight or nine years old when I was able to recognize the picture.

Q. How old were you when you first saw the man who was pointed out to you as your father?

A. CR 21, when I was about five to six years old.

Q. Then you weren't able to recognize your father from this picture which I am holding, which is Plaintiff's Exhibit No. 3?

The Court: I thought the question was when he first saw [73] the picture.

Mr. Talan: As I understand, on his direct he said he was in his teens when he first saw this picture. Now he has changed that to about eight years. That would still be subsequent to the time his alleged father was pointed out to him.

Mr. Reporter, will you read the question?

(Question read.)

The Witness: I recognize it.

Q. (By Mr. Talan): The question is, were you able to recognize the man who was pointed out as your father at Nam On Village from this picture?

The Interpreter: Will you read the question again, please?

(Question read.)

The Witness: Yes.

Q. (By Mr. Talan): How old were you when you first saw this picture?

(Testimony of Wong Hing Goon.)

A. I don't know of the date. It has been there a long time, that picture.

Q. As best you can recall, about how old were you when you first were aware of this picture?

A. Maybe eight or nine years old.

Q. How old were you when you first saw the man who was pointed out as your father in China?

A. I think five or six years old then. [74]

Q. How could you have known from this picture who this man was? A. My mother told me.

Q. Did your mother tell you who your father was when he was present? Did she point him out physically or did she point him out in the picture?

A. She has pointed out to me in the picture, "This is your father." As far as when I was five or six, what method she used to introduce him, I can't recall.

Q. When were you married?

A. 1950, July 18th.

Q. Who was present at your wedding?

A. My mother and my younger brother, my father's friend, and my several friends.

Q. What is the name of your father's friend?

A. Lee Nget Sen.

The Interpreter: That is phonetically.

Q. (By Mr. Talan): What are the names of your friends who attended the wedding?

A. Among my friends were Lee Fay Koon, Chin Yen Nen, Lee Ben Jen.

Q. Any others? A. No.

Q. How long have you known Lee Fay Koon?

(Testimony of Wong Hing Goon.)

A. I met him when I went to Hong Kong in one of the [75] firms.

Q. You didn't know him before you began living in Hong Kong? A. No.

Q. How long have you known Chin Yen Nen?

A. Also the same way in Hong Kong?

Q. How about Lee Ben Jen? A. Same.

Q. Did you have any friends from the village of Nam On present at your wedding?

A. My marriage took place at the bureau, marriage bureau in Hong Kong.

Q. Did you or did you not have some friends from the village of Nam On present at your marriage?

A. My mother and my younger brother.

Q. No. I asked about friends. These are relations.

A. My wife's father, my father-in-law.

Q. Are these all the people that were present at your marriage?

A. There were no special ceremony. We just went to the bureau and sign our names and got a paper.

Q. That isn't responsive. Were there any other people present other than the ones you have already named? A. No.

Q. Who owned the house in which you [76] lived——

The Court: If you are going to get to another subject, it is nearly 4:00 o'clock and it is necessary for me to quit promptly today. If you are through

with the marriage, we will recess until tomorrow morning.

Mr. Talan: I am through with that.

The Court: We will recess until 10:00 o'clock tomorrow morning.

(Whereupon, an adjournment was taken to 10:00 o'clock a.m., March 25, 1953.) [77]

March 25, 1953—10:00 A.M.

The Clerk: No. 14406, Wong Ken Foon vs. McGranery, for further trial.

We have a stipulation here, your Honor, for substitution of defendant.

The Court: All right.

Mr. Brennan: Ready.

Mr. Talan: Ready.

The Court: You may proceed.

Mr. Talan: Your Honor, before we proceed, I would like to make a statement with respect to the travel affidavit under which this plaintiff traveled to the United States. This is a form which is authorized by the State Department to permit an applicant who claims admission to the United States to travel to the United States to establish his right to be admitted. It is a form that is permitted to be executed upon a minimum showing that the asserted claim is with some foundation, has some basis in fact. However, the allowance or permission of the execution of this form is not a determination of the merits of the claim. It permits merely the applicant or claimant to travel to the United States where

he may then make application to the proper authorities, which in this matter would be the Immigration Service.

The Court: I understand that. [79]

Mr. Brennan: I have no dispute with that.

The Court: I understand that is the procedure.

WONG HING GOON

the witness on the stand at the time of adjournment, having been previously duly sworn, resumed the stand and testified further through the interpreter as follows:

Cross-Examination
(Continued)

By Mr. Talan:

Q. Who owned the house in which you lived in Nam On Village from the time you were born until you left in 1948?

A. It was handed down by our ancestors.

Q. Did your father own that house in which you were born and lived in Nam On Village?

A. At present we are living in it, but it was handed down to us by our ancestors.

The Court: Just a minute. What do you mean, "handed down to us"? Who is "us"?

The Witness: Every member of the family may dwell in it.

The Court: May what?

The Witness: May live in it.

The Court: You say it was "handed down to us." What do you mean when you say "it was handed down to us"?

(Testimony of Wong Hing Goon.)

The Witness: Whether it was definitely given to my father or not, I would not know, but he would know, but we all [80] live in that house.

The Court: I don't know, I don't assume—maybe the interpreter or the interpreters could give us some information—when property is handed down from generation to generation in China, I don't assume they have the same procedure as they have here, that is, they have a court order. I don't assume there is even anything in writing. Do you know about how property is handed down from generation to generation?

The Interpreter: It is just sort of an understanding. If the grandfolks left the property, the next generation would be the father of this generation, and he would take care of it. If the father died, the oldest son is in charge of it, but they don't usually, until recent times, have a definite written document to prove who should be the sole owner of that property. It is understand, they have a family sort of system that they take for granted that nobody is going to fight about it. Everybody will enjoy it, that is, the generation surviving.

The Court: Supposing there are two or three boys. Do all the boys have a right to use the house?

The Interpreter: Yes.

The Court: Or just the eldest?

The Interpreter: No, everyone. It is something like the homestead idea.

The Court: Suppose there are two or three boys

(Testimony of Wong Hing Goon.)

and they have a big family and the house isn't large enough to take [81] care of all the boys?

The Interpreter: If anyone wants to live in it, no one can stop them. But it isn't like in the United States where you have a definite, well-designated rule that a certain percentage goes to each one. We don't have that until recent times, since the founding of the Republic.

Q. (By Mr. Talan): In other words, would your father's brothers own the house as well as your father?

Mr. Brennan: Object to that as calling for a legal conclusion of this witness, your Honor, and not proper cross-examination.

The Court: I doubt very much if this witness knows. I doubt very much if any of these witnesses know. They can testify there was just a general understanding.

Mr. Talan: The witness testified the house belonged to "us."

The Court: Let's find out who "us" is.

Mr. Talan: That's what I am trying to do.

The Court: Can you tell us any more definitely, when you say the house belonged to "us," who that is, the names of the people you include in "us"?

The Witness: The American custom and Chinese custom differ in this respect. If somebody should die and hand down something to the son, if there be one son, naturally, that would be the sole person to take over the property, but if [82] there be two

(Testimony of Wong Hing Goon.)

sons, then two of them could also use the same property.

Mr. Talan: Is that the answer he gave?

The Interpreter: That's the answer he gave.

The Court: You haven't answered the question yet. You used the word "us." Give us the names of the people you mean when you say "us."

The Witness: As far as legality is concerned, I don't understand much, but I know that house was handed down to us to live in and at present we are all occupying it. That is what I meant.

The Court: Who is occupying the house now?

The Interpreter: Excuse me, Judge. He also said, "Whether it is written down for whom, I don't know."

The Court: All right. Now will you ask him the other question, who is occupying the house now?

The Witness: At present my mother is in Hong Kong. No one is living in that house now.

The Court: May I ask a question of the interpreter? Suppose no one lives in the house. Is it locked up, boarded up, or what do they do with it?

The Interpreter: That is an individual problem. I don't know. Sometimes they lock it up.

The Witness: We have left the home for so long, whether someone is living there or not, we do not know. [83]

The Interpreter: I asked if it is locked and left behind and he said the house is locked and left behind and whether someone is occupying it now or not, he wouldn't know.

(Testimony of Wong Hing Goon.)

The Court: I don't think this witness knows who is the owner of the house.

Q. (By Mr. Talan): Does your family own any other property in the village of Nam On?

A. No, not my father.

Q. Do any of your relatives own any property in the village?

A. My paternal grandfather has some.

Q. Do you have any other relatives who own any property in that village?

A. That I don't know. You mean my relations, my relatives?

Q. Relatives. A. I do not know.

The Court: Now, just a minute. You say your grandfather owns some property in the village?

The Witness: Yes.

The Court: What was it?

The Witness: Some houses and some land, a field.

The Court: Do you know what houses your grandfather owned?

The Witness: The one that my father's brother lived in [84] near us is my grandfather's property and the one we are living in, it was handed down from our ancestors. Maybe he owns that, too.

The Court: Which house is it you are referring to? Let's have the diagram. Which house are you referring to that you said was owned by your grandfather?

The Witness: This is the home handed down by our ancestors, this one with the cross is my grand-

(Testimony of Wong Hing Goon.)

father's, too.

Mr. Brennan: Indicating it to be row 5.

The Court: I thought that was a vacant house.

Mr. Talan: No.

The Court: The one below it?

Mr. Talan: Yes.

The Witness: This is the vacant lot.

The Court: When you appeared before the immigration authorities, you told them you didn't know anybody that owned any houses?

The Witness: I didn't understand the question. I was sort of nervous and confused at that time.

The Court: You were asked two or three different times if you knew who owned any of the houses in the village and you said you didn't know anybody that owned any house.

The Witness: I didn't understand the word "property," when they put it in the question and, of course, I was a little confused. I didn't want to say the wrong thing. [85]

The Court: You say your grandfather owned other houses in the village, other property in the village. What other houses did he own?

The Witness: Somewhere not in this area, five lis from here.

The Court: We were talking about the village. We were not talking about property outside the village, Nam On Village.

The Witness: No more here.

The Court: Just the one house?

The Witness: Yes.

(Testimony of Wong Hing Goon.)

Mr. Brennan: I think he has shown two houses, your Honor, has he not?

The Court: No. He has shown one house for the grandfather.

The Interpreter: This one is the ancestral house handed down, and this one, he knows his grandfather had it. He doesn't know how many generations that was handed down, but this is the one he knows.

The Court: This is the house in which you lived?

The Witness: Yes.

The Court: Have you ever been in your grandfather's house which was directly west of the house that you lived in?

The Witness: Yes. [86]

The Court: Why didn't you tell the immigration authorities that your grandfather owned the house directly to the west?

The Witness: I can't explain the reason, because I was there being questioned for several hours and it may be I wasn't sure of the question.

The Court: My recollection of the transcript that you read yesterday is that he said several times he did not know the names of anybody else that lived in the village.

Mr. Talan: That is true.

The Court: Was he asked directly? It seems to me he was asked the name of the person who lived in the house directly to the west and he said he did not know. Is that correct?

Mr. Talan: I don't recall his exact answer.

(Testimony of Wong Hing Goon.)

The Court: Can you find that in the transcript? Have you got your transcript here? Here is the transcript. I know two or three times he said he didn't know anybody, and it seems to me that either here yesterday you asked who lived in the house directly to the west or he was asked at this immigration hearing. Read it so we can all hear it.

Mr. Talan: It is on page 8, the first part of the exhibit.

"Q. When you were last in China, who occupied the fourth house, located on the fifth lot, in the fifth row, counting from the head. In other [87] words, the house directly west of your house?

"A. I want to repeat what I said a while ago again, that I don't remember anybody's name in the village."

The Court: It is my recollection he was asked about this specific house.

Mr. Brennan: Well, I don't think he was asked in the immigration hearing about the——

The Court: Well, this question here says he didn't know the name of anybody in the village and, not only that, but he said it two or three times. He emphasized it. It is inconceivable how a youngster could live in a village of 40 or 50 houses for 20 years and then say he doesn't know anybody that lived in the village. If it was an American youngster, he would be in every one of the houses and probably could tell you more about the life history of the people than they could themselves.

Mr. Talan: Shall I proceed, your Honor?

(Testimony of Wong Hing Goon.)

The Court: Go ahead.

Q. (By Mr. Talan): Does your family own any rice land in or near the village of Nam On?

The Court: Limit the word "family." Family members or ancestors? Let's limit it. Who do you mean by family?

Q. (By Mr. Talan): Let's put it this way: Did your grandfather own any rice land in or near the village of Nam [88] On? A. Yes.

Q. Did your father own any rice land in or near the village of Nam On? A. No.

The Court: Then may I ask a question? Your grandfather is dead?

The Witness: He is dead.

The Court: What happened to the lands your grandfather owned?

The Witness: Grandmother.

The Court: Is your grandmother still alive?

The Witness: Living.

Q. (By Mr. Talan): Do you consider your grandmother a member of your family?

A. Yes.

Q. Did you say your grandmother owns some rice land near the village of Nam On?

A. Yes.

Q. I direct your attention to page 12 of Exhibit 1 attached to Defendant's Exhibit A, and ask whether you gave the following answer under oath to this question:

"Q. What rice land does your family own?

"A. They don't own any rice land."

(Testimony of Wong Hing Goon.)

Mr. Brennan: You are referring to the second part? [89]

Mr. Talan: Yes, page 12, the second series of pagination.

The Witness: My answer was for ourselves, the younger generation.

Q. (By Mr. Talan): But you do understand your grandmother to be a member of your family?

A. Although we are all one family, what belongs to grandmother, when the harvest comes, she gets the property from the harvest, and what we plow, we get our own. That is the way, I think.

Q. Did you ask the person who was examining you at that time to explain what he meant by that question?

A. I didn't ask any question. I was quizzed for several hours and I was confused with the question to begin with.

Q. Then did you give this answer, "They don't own any rice land," in answer to that question which was asked of you by the primary inspector on January 29, 1952, at San Pedro, California?

A. I just don't even remember the exact wording of that question, but I want to explain my interpretation of the family is that way.

Q. I would like a yes or no answer. Did you give that answer?

The Court: Doesn't the transcript speak for itself?

Mr. Talan: It isn't in evidence yet. I want a yes

(Testimony of Wong Hing Goon.)

or no answer, he either did or did not give this answer. [90]

The Court: All right.

The Witness: His word "they" is what confused me. My "they" here meant the younger generation.

Q. (By Mr. Talan): Well, did you give that answer? Did you answer in those words?

The Interpreter: I asked him already and he wants to explain.

The Witness: I don't know the English translation of it, but my way was the present generation.

Mr. Talan: I don't seem to be getting a responsive answer. I will drop it at this point.

Q. When you left the village of Nam On on or about August or September of 1948, how many vacant houses were there at that time in the village?

A. You mean just an empty house or the lots, too?

Q. Just the houses at this time.

A. What I know were two.

Q. Which ones were they?

A. As far as I can recollect, it is the third row, third house, and the eighth row, third house.

Q. These houses were vacant at the time you left in 1948? A. Yes.

Q. I direct your attention to page 5 of Exhibit 1 attached to Defendant's Exhibit A and ask whether you gave the [91] following answer under oath to this question:

"Q. Are there any vacant houses in the village?

"A. No vacant house that I know of; unless

(Testimony of Wong Hing Goon.)

they have become vacant since I went to Hong Kong in 1948."

A. I don't know even what they have asked and about my answers at the immigration, but I do remember there were two houses vacant when I left for Hong Kong in 1948.

Q. Well, I would like to know, yes or no, whether you gave this answer: "No vacant house that I know of; unless they have become vacant since I went to Hong Kong in 1948."

A. I don't recall answering the question in that manner, because I was quite confused when they asked me many, many questions that day.

The Court: Let's have the map again. Will you point out the two vacant houses?

The Witness: This one and this one (indicating).

The Court: You are talking about the third house in the third row, is that correct?

The Witness: Yes.

The Court: And the third house in the eighth row?

The Witness: Yes, 8-3, that's right.

The Court: Those were vacant?

The Witness: As far as I recall, these were two vacant [92] houses.

The Court: When you went down to Hong Kong, the house directly to your west wasn't vacant, that is the fifth house in the fifth row?

The Interpreter: Wasn't vacant, you said?

The Court: Was not vacant.

(Testimony of Wong Hing Goon.)

The Witness: No.

The Court: Your grandfather lived in that house?

The Witness: My aunty. My father's older brother's wife.

The Court: She lived in the house?

The Witness: Yes.

The Court: Were there any children in that house?

The Witness: Yes.

The Court: How many?

The Witness: A girl and a boy, a daughter and a son.

The Court: How old was the boy?

The Witness: He is 20 this year, about 20 years old now.

The Court: The boy is about your age then?

The Witness: I am a few years older than he.

The Court: A few years older?

The Witness: I am about six years more older.

The Court: How about the girl, how old was the girl?

The Witness: 17 now. [93]

Q. (By Mr. Talan): When you left the village of Nam On in 1948, how many vacant lots were there then in the village? A. Two.

Q. Which ones were they?

The Court: You'd better show him the diagram. Let's get it on the diagram. Can we designate it by the row?

The Witness: Seventh row, the fourth one.

(Testimony of Wong Hing Goon.)

Q. (By Mr. Talan): The fourth what?

A. Lot. Fifth lot and the fourth lot, also.

Q. I direct your attention to Exhibit 1, attached to Defendant's Exhibit A and ask you whether you gave the following answer under oath to this question.

Mr. Brennan: What page?

Mr. Talan: Page 12, Exhibit 1, attached to Defendant's Exhibit A.

Q. "You have stated that the fourth lot in the fifth row in Nam On village is vacant. Are there any other vacant lots in the rows between the houses? A. None that I can remember."

A. It seems I might have answered that way.

Q. Did you answer the question that way? Is that your answer?

A. I am not very sure. It seems I might have answered that way, but I am not definite. [94]

Q. While you lived in the village of Nam On from the time of your birth until 1948, who occupied the first house in the seventh row?

A. Wong Wing Yen.

Q. Who else lived in the house there with him?

A. His family.

Q. Who were the members of his family?

A. As far as I know, there is a wife and a son living with him.

Q. What are their names?

A. I don't know the wife's name. We just call her by the village way, like madam somebody, and the son's name is Wong You Fong.

(Testimony of Wong Hing Goon.)

Q. Will you tell us how the father's name is spelled?

A. Wing Yen (phonetically) or Wen Yen.

Q. Who is Wen?

A. Wen may be spelled W-e-n or W-i-n-g. The character is the same.

Q. Was there a person by the name of Wen Yen living in the first house in the seventh row while you lived in the village of Nam On? A. Yes.

Q. Who is he?

A. He is one of the villagers.

Q. Is he the same person as Win Yen? [95]

The Interpreter: How do you spell that?

Mr. Talan: W-o-n-g W-i-n Y-e-n.

The Interpreter: I think it's the same phonetically.

The Court: Ask the witness.

The Interpreter: He just said it is the same.

The Witness: There is only one Wen Yen.

Q. (By Mr. Talan): Is he the person who lived in the first house, seventh row, in Nam On Village while you lived there? A. Yes.

Q. When you left your house in Nam On Village in 1948, who was living there at that time?

The Court: I think we'd better clarify that. You mean just before he left?

Mr. Talan: Just before he left.

The Court: Or after he left?

Mr. Talan: Just before he left, who was in that house.

The Court: All right. Just before he left.

(Testimony of Wong Hing Goon.)

The Witness: My mother and younger brother.

Q. (By Mr. Talan): Was there anybody else living in the house at that time?

A. My mother and my younger brother.

The Court: And you? You were living in the house?

The Witness: Yes, of course.

Q. (By Mr. Talan): I direct your attention to page 13 [96] of Exhibit 1 attached to Defendant's Exhibit A, and ask whether you gave the following answer under oath to this question:

"Q. What were the sleeping arrangements in your house in Nam On Village just prior to your departure for Hong Kong in 1948?

"A. My No. I uncle's family occupied the big door side bedroom. I don't know the sleeping arrangements in that bedroom. There are two beds in our bedroom which is the small door side bedroom. My mother occupied the larger bed by herself. My younger brother and I occupied the smaller bed."

A. I meant that the two children of my uncle oftentimes come over and occupied the bedroom on the right side, I mean on the big door.

Q. Did that include your aunt, too?

A. Usually the children. My aunty very seldom.

Q. Did you give that answer that has been read? Yes or no.

A. Yes. I meant the children.

The Court: Were they living in the house just before you left?

(Testimony of Wong Hing Goon.)

The Witness: Sometimes.

The Court: Was this house any different than the ordinary Chinese house in construction on the inside? [97]

The Witness: About the same.

The Court: It had a courtyard on which the sleeping rooms opened, that is, a room, but the big door and little door opened into the one courtyard or one room?

The Witness: You see, it is the same. There are some newer ones that may be different, meaning modern ones may be different.

The Court: But how about this house?

A. It is of the general type.

Q. (By Mr. Talan): Who lives in this house in Nam On Village at the present time?

A. At present, I do not know who.

Q. Do you know whether or not anybody is living there? A. No. Don't know.

The Court: Just a minute. Let me ask a question. Who lived in the house at the time you appeared before the immigration authorities after you came to the United States.

The Witness: I do not know.

The Court: All right.

Q. (By Mr. Talan): I direct your attention to page 13 of Exhibit 1 attached to Defendant's Exhibit A and ask whether or not you gave this answer under oath to this question:

"Q. Who now occupies this house?

"A. My No. 1 uncle's family still occupies [98]

(Testimony of Wong Hing Goon.)

the big door side. Our side is vacant."

A. Yes. I meant on our side it was vacant, but on the other side, if they went and lived in there, which is very likely, because they could go and live on the right side when our house is vacant.

Q. That is your answer?

A. That is my meaning.

Mr. Talan: Your Honor, I now offer Defendant's Exhibit A in evidence.

The Court: It was marked for identification. It may be received in evidence.

The Clerk: So marked, Defendant's Exhibit A.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

Q. (By Mr. Talan): Where is Jeung Sing Village with reference to Nam On Village?

A. About five miles.

Q. Did you ever visit this village?

A. Yes.

Q. What were the occasions of your visits to that village?

A. My grandmother lived there.

Q. Do you know how many times you visited her in Jeung Sing Village?

A. I can't tell you exactly how many times, but occasionally [99] I went to see her there.

Q. Can you remember how old you were the first time you visited your grandmother in Jeung Sing Village?

A. I can't exactly tell because when I was

(Testimony of Wong Hing Goon.)

young, my mother might have taken me there as the first time.

Q. To the best of your recollection, how old were you? Were you in your teens? Were you 20? Just about how old were you when you first visited your grandmother in Jeung Sing Village?

A. She move there about CR 23, and I guess I was about seven or eight years old. I am not sure of the exact age.

Q. I direct your attention to page 6 of Exhibit 1 attached to Defendant's Exhibit A and ask whether you gave the following answer under oath to this question:

"Q. In addition to the two villages, Long Baw and Nam Lok, which you have already located in the vicinity of Nam On Village, please locate the following:"——

And among the villages was Jeung Sing Village. To which you gave this answer:

"A. I don't know where Jeung Sing Village is."

A. This word is different from the village spelling, I mean the enunciation was different. It didn't occur to me it was the same village my grandmother was living in.

Q. Did you state at that time in answer to that question, [100] "I don't know where Jeung Sing Village is"?

A. This is not the village. There is no such a village in Chinese. It is this way (witness writing).

(Testimony of Wong Hing Goon.)

That translation is incorrect, because this is the right word for the Chinese.

Q. Well, did you give that answer, whether or not it was with reference to the village you had in mind? All I am asking is, did you make that answer, "I don't know where this village is"?

A. Yes.

Q. Did you go to school in Nam On Village?

A. Not there.

Q. Where did you go to school while you lived in Nam On Village? A. Bok Hon School.

Q. Where was that located with reference to Nam On Village? A. About a li or so.

Q. In which direction? A. North.

Q. How long did you attend the Bok Hon School? A. Four years.

Q. What was the last grade you finished in that school? A. Fourth year. [101]

Q. Did you have any additional schooling in China?

A. I went to Toy Shan or Hoy Shan, Guey Jan School.

Q. How long did you attend that school?

A. About half a year.

Q. Was that a high school?

A. Middle school, we call it in China, secondary, equivalent to our secondary.

The Court: Did you go to that school after you went to Bok Hon School?

The Witness: After my studying at Bok Hon, I did not go to school during war. After the war I

(Testimony of Wong Hing Goon.)

went to Guey Jan School in Hoy Shan.

Q. (By Mr. Talan): How many years, education have you had?

A. About four and a half years.

Mr. Talan: I have no further questions, your Honor.

The Court: Well, I notice it is 11:00 o'clock. We will take our morning recess. We will recess until 15 minutes after 11:00.

(Recess.)

The Court: You may proceed.

Mr. Brennan: Call Russell K. Fong. Will you take the stand, please? [102]

RUSSELL K. FONG

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: You understand English?

The Witness: Yes.

The Clerk: Your name, please?

The Witness: Russell K. Fong.

Direct Examination

By Mr. Brennan:

Q. Mr. Fong, you are a public accountant, are you? A. Yes.

Q. During the years 1943 through 1947, were you employed by the Wong Jew Produce Company as accountant for them? A. Yes.

(Testimony of Russell K. Fong.)

Q. Did you bring with you your records relating to an employee of that company by the name of Wong Ken Foon? A. Yes.

Q. May I see the record that relates to the withholding tax deductions for Wong Ken Foon?

Mr. Talan: Your Honor, I would like to enter an objection to this line of examination on the basis that if counsel is going into the preparation of income tax returns for [103] the plaintiff's alleged father, why, this man's testimony is not the best evidence available to establish what income tax returns were made and what dependents he claims were made in the income tax returns for the years in question.

The Court: Overruled.

Q. (By Mr. Brennan): You have now shown me a card, at the top of which is the wording "Social Security No. 565-30-0202, name Wong Ken Foon, and the year 1943, address 279 North Lake Avenue, Pasadena."

Is that in your handwriting?

A. Yes, it is in my handwriting.

Q. Did you, under the wording "Dependents" place the lettering "4"? A. Yes.

Q. The No. 4? A. Yes.

Q. Where did you get the figure 4?

A. When the employer asks for how many dependents he got, you have to take down that in order to get the withholding tax credit withheld, you see.

(Testimony of Russell K. Fong.)

Q. You secured that and put that on your records in 1943?

A. I didn't secure it directly, but his employer got it from him and then the employer gave it to me that way.

Q. But you placed this figure on here? [104]

A. Yes.

Q. Then did you determine the deductions to be made or the amount of withholding tax to be withheld by the produce company from those figures?

A. Oh, yes.

Q. Did you bring with you the employer's tax record? A. Yes.

Q. For the years 1942 and 1943?

A. 1942, is here.

Q. 1942, you show me "this copy must be kept by employer," employer's tax return 1942. Does that show the name on there of an employee by the name of Wong Ken Foon?

A. Yes. On the last quarter, his name appears here, you see.

Q. You have shown me a page that is the report for the last quarter? A. Yes, last quarter.

Q. Is that the first time in 1942, that the name Wong Ken Foon appears? A. Yes.

Q. And that shows taxable wage paid of $37.50, is that correct? A. Yes, that's right.

Q. What does that indicate to you from those records as to the amount of time that he was employed during 1942? [105]

(Testimony of Russell K. Fong.)

A. I don't remember whether they gave me the figures. The employer gave me the figures, see, and enter here. That is all.

Q. That is the only wage at that time?

A. Yes.

Q. Do you have the same records for 1943?

A. Yes.

Q. You show me employer's tax return paid April 21, 1943. Does that show the name of Wong Ken Foon as an employee?

A. Yes. That is the first quarter of 1943.

Q. That shows the total paid of $560.40 for the first quarter, is that correct? A. Yes.

Q. Did you determine from that how the amount paid was determined?

A. The employee gave me the record, the payroll record. I enter here on the card and the form here, enter the total to this quarterly report.

Q. So the total of $560.40 was determined from the figures in your quarterly card that you have just referred to as the payments that were made form week to week to Wong Ken Foon in that first quarter? A. Yes.

Q. And that you determined by the amount of dependents [106] being four, is that correct?

A. Yes.

Q. Is that true of each quarter from 1943 for some period after that time? A. Yes.

Q. How long do your records show that you continued to use four dependents for the purpose of withholding tax deductions?

(Testimony of Russell K. Fong.)

A. From 1943, through 1949.

Q. In 1949, do you know why there was a—withdraw that.

Did Wong Ken Foon terminate his employment with the produce company in 1949?

A. Yes, in December, 1949.

Q. That was the reason for discontinuing the records as far as he was concerned? A. Yes.

Q. Is that correct? A. Yes.

Q. He severed his employment with the company? A. Yes.

Q. I show you a statement—I have shown these to counsel—I show you a statement of income tax withheld on wages, calendar year 1943, employee's receipt, Wong Ken Foon, giving the same social security number which we just read from [107] your records, with the employer Wong Jew Produce Company, and ask if that was prepared under your direction? A. I prepared it myself.

Q. Is that a carbon copy of what you prepared and furnished to the employee?

A. Yes, I did.

Q. That shows a total wage paid during the calendar year 1943, of $2,621.90, is that correct?

A. That's right.

Q. And the amount of income tax withheld as $72.80? A. Yes.

Q. And that corresponds with this card which we refer to, is that correct? A. Yes.

(Testimony of Russell K. Fong.)

Q. And it was from this card that you made this up? A. Exactly.

Q. From this you used a figure of four dependents to determine the amount of income tax withheld, is that correct? A. Yes.

Mr. Brennan: At this time we offer in evidence the document which I was using just now in interrogating the witness?

Mr. Talan: I will object, your Honor. I will insist that this is not the best evidence of what——

The Court: I assume that the proper thing to do would be [108] to get a certified copy, but there is no use putting the parties to this expense or trouble if it isn't necessary. If you will tell me you don't think this is a proper copy, I will sustain the objection.

Mr. Brennan: If your Honor please, we have a further and additional difficulty that I pointed out in connection with another case earlier. For the purpose of the record, I will present it here. We are informed by the Director of Internal Revenue that they have no records preserved for income tax returns filed in the years 1946 or earlier. The 1946 records and all earlier returns have been destroyed as they are not required to be kept by the government. So we are having now to proceed with secondary evidence in view of the fact that there is no opportunity of securing certified copies of these returns.

On the further ground that we are presenting this as direct evidence of what this man prepared, which

(Testimony of Russell K. Fong.)

I think is the best evidence of what this record shows.

The Court: The objection is overruled. It may be received and marked Plaintiff's Exhibit 5.

The Clerk: So marked.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

Q. (By Mr. Brennan): Did you prepare this document that I now show you? [109]

A. No, I didn't prepare this one.

Q. Did you prepare this document that I now show you? A. Yes.

Mr. Brennan: May this be marked for identification?

The Court: It may be marked Plaintiff's Exhibit 6 for identification.

The Clerk: So marked.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Brennan): I show you Plaintiff's Exhibit 6 for identification and ask you what that represents?

A. It represents the total amount wages paid him in 1944, $3,211, and the withholding tax $143.

Q. That is for the year 1944? A. Yes.

Q. Was that prepared from a similar card from your original records?

A. Yes. I have it right here.

(Testimony of Russell K. Fong.)

Q. How many dependents did you use in determining the withholding tax?

A. Four dependents.

Q. Four dependents for the year 1944, is that correct? A. Yes.

Q. And this was prepared, Plaintiff's Exhibit No. 6 [110] for identification was prepared by you and furnished to Wong Ken Foon?

A. Yes, that's right.

Mr. Brennan: I offer this in evidence.

The Court: It may be received and marked Plaintiff's Exhibit 6.

The Clerk: So marked.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 6.)

Q. (By Mr. Brennan): Did you prepare this document that I show you?

A. No, I don't think so.

Q. Do the records which you keep show the names of the dependents for any of the employees of the company?

A. No. The men are Chinese, you know, and they don't understand the name, you know.

Q. I take it from that it is your statement that your records do not show the names of who the dependents are? A. Yes.

Q. It just shows the number of dependents?

A. Yes.

Mr. Brennan: Cross-examine.

(Testimony of Wong Hing Goon.)

Mr. Talan: We have no cross-examination, your Honor.

Mr. Brennan: May this witness be excused?

The Court: May the witness be excused? [111]

Mr. Talan: Yes, your Honor.

The Court: You may be excused.

(Witness excused.)

Mr. Talan: May we recall Wong Ken Foon at this time?

Mr. Brennan: Oh, yes.

The Court: Is this for cross-examination?

Mr. Talan: Yes.

WONG KEN FOON

a witness by and on behalf of the plaintiff herein, having been heretofore duly sworn, resumed the stand and testified further through the interpreter as follows:

Cross-Examination
(Continued)

By Mr. Talan:

Q. When was the last time you were in China and in Nam On Village in China?

A. CR 22.

The Interpreter: 1933 or early 1934.

Q. (By Mr. Talan): On this last visit to Nam On Village around the year 1933 or 1934, where did you stay? A. Nam On Village.

Q. Where in the vilage did you stay on this visit? A. My own home.

Q. And where is your own home located in the

(Testimony of Wong Ken Foon.)

village? [112] A. Sixth row, fifth house.

Q. On that visit, how long did you live in that house in Nam On Village?

A. As long as I was in China, at home.

Q. How long was that?

A. About 13 months.

Q. While you were living in that house for those 13 months, who else was living in that house?

A. My wife, my two sons, myself, and sometimes my sister-in-law and her children.

The Court: How many children of your sister-in-law?

The Witness: She has two boys and a girl.

Q. (By Mr. Talan): What are the names of your sister-in-law and her children?

A. My sister-in-law's name is Lee Shee. The children are Sil Fung, Shee Moon, Shee Ting.

Q. During this visit some time in 1933 or 1934, did your parents live in the same house?

A. Yes.

Q. They lived in the house, too, with your wife, your two sons, yourself, your sister-in-law and her children?

A. Not necessarily at one time, not necessarily we all together at one time.

Q. While you were in the village for 13 months some time in 1933 and 1934, did your parents at any time during [113] that period live in the same house? A. Yes.

Q. Was it during the first part of your stay in 1933 or 1934, or the latter part of your stay?

(Testimony of Wong Ken Foon.)

A. The first part of the stay.

Q. How long did your parents live in the house before they left that house?

A. Until the time they moved.

Q. Until they moved from the village of Nam On or moved to another house in Nam On?

A. To another village.

Q. Prior to the time your parents moved from the village of Nam On, did they live with anybody else in the village of Nam On?

A. You mean my mother?

Q. Both parents.

A. I think the time when I was home, she just stayed with us only, they stayed with us only.

Q. I direct your attention to page 16 of Defendant's Exhibit A and ask you whether or not you gave the following answer under oath to these questions:

"Q. When did your mother move from Nam On Village to Jung Sing Village?

"A. About CR 23 (1934).

"Q. Where did she live prior to that time [114] in Nam On Vilage?

"A. With my brother, Wong Ken Fook."

A. I am not clear what you mean by did she live away from us, or what is the exact meaning of your question.

Q. All I want to know at this time is did you give those answers to these questions:

"Q. When did your mother move from Nam On Village to Jung Sing Village?

(Testimony of Wong Ken Foon.)

"A. About CR 23 (1934).

"Q. Where did she live prior to that time in Nam On Village?

"A. With my brother, Wong Ken Fook."

Did you make those answers to those questions?

A. This is right. I couldn't guarantee she hadn't lived with Wong Ken Fook before then.

Q. Did you give this answer, "With my brother, Wong Ken Fook"?

A. I don't remember.

Q. While you were visiting in Nam On Village in 1933 and 1934 and living in your house in the village, during what part of that visit did your sister-in-law and her children live with you in that same house?

A. No definite time.

Q. Did your sister-in-law and her children sleep over in the house while you were living there? [115]

A. Sometimes.

Q. Were your sister-in-law and her children regular members of the household in that house where you were staying while you visited in Nam On Village in 1933? A. Yes.

Q. I direct your attention to page 14 of Defendant's Exhibit A and ask whether you gave the following answer under oath to this question:

"Q. You told the primary inspector that the family of your brother, Wong Ken Fook, lives in the fifth house on the fifth row, the house directly opposite the large door of your house. Was that statement correct? A. Yes.

A. Yes, that's right.

(Testimony of Wong Ken Foon.)

Q. I direct you attention to page 14 of the same exhibit and ask whether you gave the following answer under oath to this question:

"Q. Has your brother, Wong Ken Fook's, family always lived in that same house?

A. Yes."

Mr. Brennan: Before that is answered, counsel, you skipped, I believe, several questions and answers, and there is no showing as to what that "same house" refers to. Apparently there is a question and answer just ahead of that one which refers [116] to the fifth house in the fifth row, rather than the fifth house in the sixth row.

Mr. Talan: That is the question.

Mr. Brennan: If your Honor please, the question as presented by counsel is unintelligible to this witness without asking the question and answer immediately preceding.

The Court: Supposing you read that.

Mr. Talan: Which one are you referring to, Mr. Brennan?

Mr. Brennan: Maybe I have got the wrong one. Is this what you have just read?

Mr. Talan: No, this here.

Mr. Brennan: I am sorry. Counsel was right.

The Witness: The fifth row, the fifth house, you mean?

Q. (By Mr. Talan): That's right.

A. They can any time come over to our house and live, too.

Q. I direct your attention to page 14 and ask

(Testimony of Wong Ken Foon.)

whether you gave the following answer under oath to this question:

"Q. Have your family and the family of your brother, Wong Ken Fook, ever lived together in the same house, to your knowledge?

"A. No, not to my knowledge."

A. My meaning was because our house was handed down from our ancestors, that they have the right to come any time and live. What I meant was the permanent living, that they [117] don't live together with us.

Q. Did you make that answer?

A. My answer was the interpretation, "No, not permanently living with us, but they did come over whenever they can, because it is an ancestral home left for all of us to enjoy."

Q. When you were last in China in the village of Nam On who occupied the last house in the tenth row counting from the west?

A. Wong Wah See.

Q. Did anybody else live in the same house with Wong Wah See? A. The family.

Q. What did his family consist of?

A. His wife and two daughters.

Q. How old were the daughters at that time?

A. Not very big.

Q. Can you tell us what their ages were at that time?

A. Perhaps about seven years old or so.

Q. Were they both seven?

(Testimony of Wong Ken Foon.)

A. I don't know, really, but I am just guessing seven or eight.

Q. When you were last in the village of Nam On in the year 1933, who occupied the first house in the seventh row of the village counting from the west? [118] A. Wong Nguey Jim.

Q. Who else lived there in the house with Wong Nguey Jim? A. Wife, a boy, a son.

Q. How old was the boy?

A. Several years old.

Q. About how many would that be, about how many would several years be?

A. Maybe four or five.

Q. What was this boy's name?

A. I don't remember the name.

Q. When you were last in the village of Nam On, how old a man was this Wong Wah See who lived in the house in the tenth row of the village counting from the west?

A. In his fifties, I think.

The Court: You testified a little while ago that his family lived in that house.

The Witness: Yes.

The Court: Did his wife live in the house?

The Witness: Yes.

The Court: And children?

The Witness: I think the time when I was there, they had children.

The Court: How old were the children?

The Witness: I don't know how to tell the little children, [119] but four, five, seven or six years old.

(Testimony of Wong Ken Foon.)

The Court: Were they boys or girls?

The Witness: Girls, all girls.

The Court: Do you know who lives in the house now?

The Interpreter: That is in the tenth row?

The Court: Yes.

The Witness: I think the parents are still living there, Mr. and Mrs.

The Court: But you are sure that these were all girls?

The Witness: According to my knowledge, I think they were girls.

The Court: Your alleged son testified before the immigration authorities:

"The one I mean is at the tail end, counting from the west; that would be on the east side; and that belongs to Wong Wah See.

"Q. How do you happen to remember the owner of that house when you can't remember the owners of the houses next door to yours?

"A. He is a bachelor, that lives in that little house, just a little bit older than I am so I visited him all the time."

The Witness: I am talking about the age of this man at this time, which would be 50 something.

The Court: How many years ago was it when you were in [120] China?

The Witness: About 20 years ago.

The Court: So when you were in China he was about 30 then?

(Testimony of Wong Ken Foon.)

The Witness: I thought he was in his thirties. I never asked his age.

The Court: You thought he was about in the thirties?

The Witness: Yes.

The Court: At that time your boy was how old?

The Witness: He was very small, a few years old.

The Court: Wasn't he about six or seven?

The Witness: Yes.

The Court: And this family that lived in the house didn't have any boys, they were all girls?

The Witness: Maybe it is a mistake. I don't know.

The Court: I notice it's 12:00 o'clock. I think this is a pretty good place to break. We will now recess until 2:00 o'clock this afternoon.

Thereupon, a recess was taken to 2:00 [121] p.m.)

March 25, 1953, 2:00 P.M.

The Court: You may proceed.

Mr. Brennan: Your Honor, as I returned this noon, the witness asked me if he could make a correction in one item that he covered this morning.

The Court: You mean the present witness?

Mr. Brennan: Yes, your Honor.

The Court: Yes, he can make any explanation he wants to. Let him take the stand.

WONG KEN FOON

the witness on the stand at the time of recess, hav-

(Testimony of Wong Ken Foon.)

ing been heretofore duly sworn, resumed the stand and testified further through the interpreter as follows:

Mr. Brennan: Will you tell the witness anything he wishes to say in correction of any statement he made this morning he may do so.

The Witness: I want to correct the point that the seventh row and first house, the person who lived there should be Wong Wing Yen.

The Interpreter: The Wing could be W-e-n, according to pronunciation.

Mr. Brennan: With the court's permission, may I ask the interpreter if there is a noticeable similarity in the word, [122] the Chinese word that is used, that we would interpret alley and the Chinese word that we would interpret row of houses?

The Interpreter: Mr. Attorney, the intonation is the variation. The words are different when written. If you raise your voice a bit and talk, it is another word. It just happened that these two words have the same sound.

Mr. Brennan: Will you give the Chinese word for alleyway and then the Chinese word for row, following one right after the other?

The Interpreter: Alley would be hong and the row would be hong. There are four tones to a Chinese character and sometimes when you just mention one sound, unless you have the context, it could be mistaken.

Mr. Brennan: I thought I would call that to the Court's attention. It was just called to my atten-

(Testimony of Wong Ken Foon.)

tion during the noon hour, your Honor. That's all I have. Thank you.

Mr. Talan: Along the same line, what is the word for house in Chinese?

The Interpreter: Oak.

Mr. Talan: There is no similarity between that word and the word for alley, is there?

The Interpreter: No. [123]

Cross-Examination
(Continued)

By Mr. Talan:

Q. When you were last in China in Nam On Village about the year 1933, who occupied the fourth house in the sixth row, that is the house directly south of the one in which you lived?

A. Wong Sai Hor, Hall, or Ho.

Q. Who else lived in the house besides Wong Sai Hor?

A. All I know, Mr. Wong Sai Hor and the wife lived there.

Q. Did they have any children living there at that time? A. I don't remember.

Q. Do you know whether or not they have any children?

A. Maybe if they had a son, if he is young, I wouldn't know.

Q. At the time you were in China on this last visit some time in 1933 and you were living in Nam On Village, the only two people living at that time

(Testimony of Wong Ken Foon.)

in the fourth house, sixth row, were Wong Sai Hor and his wife, is that correct?

A. I am not sure whether there were any children in the house or not.

Q. You don't recall any children at that time?

A. It seems I have seen a boy in the house that belonged to them, the household. I don't know who the boy is.

Q. About how old was this boy that you saw in the household? [124] A. Very small.

Q. When you were last in Nam On Village in and about 1933, were there any vacant lots in the village at that time?

A. There may be some, but I don't remember whether there were any or not.

Q. When you were in Nam On Village in 1933, who occupied the first house of the first row counting from the west of the head of the village?

A. Wong Don Soon.

Q. Who else lived in that house with Wong Don Soon? A. His family.

Q. What members of his family, who were the members of his family living in that house?

A. The wife and, I think, a son.

Q. Do you know their names?

A. I think the boy's name was Wong Loy Gin or Jin.

Q. How old was this boy at that time?

A. I guess about four or five years old.

Q. At this time while you were visiting China in 1933, were there any other structures on that first

(Testimony of Wong Ken Foon.)

lot of the first row, counting from the head of the village?

A. There was a girl's home there.

The Court: There was a what?

The Witness: A girl's home, a girl's school. There [125] were two structures. One for the girls, a sort of dormitory, and the other is a sort of girls' school.

Q. (By Mr. Talan): In other words, there were three structures on this first lot in the first row, is that correct? A. Yes, three.

Q. When you were last in China in Nam On Village in 1933, who occupied the third house of the sixth row counting from the west?

A. Wong Don You.

Q. Who lived in this house with Wong Don You during the time you were in China?

A. Wife and son.

Q. And what are their names?

A. We Chinese just called the wife such-and-such a madam, but the son's name, I don't remember.

Q. About how old was this boy that lived in this third house in the sixth row?

A. About eight years old or nine.

Q. When you were last in China in Nam On Village, who occupied the second house in the sixth row? A. Wong Wah Koon or Quoon.

Q. Who else lived in the house, if anybody, with Wong Wah Koon?

A. I know that he has a wife. I don't know whether [126] they have children or not.

(Testimony of Wong Ken Foon.)

Q. When you were last in China in 1932, who occupied the first house in the sixth row counting from the west?

A. Wong Nguen Doon, D-o-o-n, or D-u-e-n.

Q. Who else lived in that house, if anybody?

A. At that time I know that the wife was living with him.

Q. Were there any children in the house at that time? A. I am not sure of that.

Q. At the time you were in China in 1933, in Nam On Village, was there a person by the name of Wong Sai Wing living in the village?

A. Yes.

Q. Where did he live?

A. I think about the eighth row, the fourth house from the west.

Q. That is counting from the west?

A. The fourth house.

Q. When you were in China in 1933 and living in the village of Nam On, was there a person by the name of Wong Sai Koon living in the village?

A. I can't recognize that name.

Q. W-o-n-g S-a-i K-o-o-n.

A. I can't recognize that name.

Q. What land do you own in the village of Nam On? [127] A. I have none.

Q. The house where you lived when you were in China in 1933, to whom does that belong?

A. According to Chinese convention, that house is mine because it was handed down from my ancestors.

(Testimony of Wong Ken Foon.)

Q. Do you have any relatives in the village who own land there?

A. My father has a piece of land handed down, rice field, planting of rice.

Q. Who owns that land now?

A. My mother's.

Q. Do your brothers own any land in Nam On Village? A. You mean the fields?

Q. I mean land.

A. I am not sure whether he has any or not.

Q. Who is "he"?

The Interpreter: Didn't you ask about a brother?

Q. (By Mr. Talan): Do any of your brothers own any land in the village of Nam On?

A. I don't know, any of my brothers, whether they own anything.

Q. Do any of your brothers own any houses in the village of Nam On?

A. I think the one across the way from us belongs to him. [128]

Q. Who is "him"? A. My older brother.

Q. When did you last see the plaintiff in this case, Wong Hing Goon? A. The last time?

Q. When did you last see the plaintiff in this case?

The Court: The last time was probably this noon.

Mr. Brennan: Or right now.

Mr. Talan: I will withdraw the question and rephrase it.

Q. When did you see the plaintiff in this case,

(Testimony of Wong Ken Foon.)

Wong Hing Goon, in China? A. CR 22.

The Interpreter: 1933 or early 1934.

Q. (By Mr. Talan): You never saw him since then until you saw him again in the United States?

A. Yes.

Mr. Talan: I have no further questions, your Honor.

Mr. Brennan: With the court's permission, one or two questions, if I may reopen direct examination?

The Court: All right.

Mr. Brennan: May we have these marked with two separate numbers for identification?

The Court: They may be marked for identification only as Plaintiff's Exhibits 7 and 8.

The Clerk: So marked, your Honor, 7 and 8, for identification [129] only.

(The documents referred to were marked Plaintiff's Exhibits 7 and 8 for identification.)

Redirect Examination

By Mr. Brennan:

Q. I show you a document, plaintiff's Exhibit 7 for identification, entitled, "Optional U. S. Individual Income and Victory Tax Return—Calendar Year 1943," and ask you if you were present and saw that made out? A. Yes, I was there.

Q. Did you have someone make this out for you?

A. Yes.

Q. Do you know who that was?

(Testimony of Wong Ken Foon.)

A. So long ago, I can't recall.

Q. Whoever it was that made it out for you, what did he do with Plaintiff's Exhibit 7?

A. The original?

Q. No, this one.

A. Sent it for the tax bureau.

Q. That is the original. I want to know when he got this paper I am now holding, Plaintiff's Exhibit 7 for identification?

A. I was keeping it at home.

Q. Did the man that made it out at the time it was made [130] out hand it to you and did you keep it until now? A. Yes.

Q. When he made this paper out for you, did he also make another one that was mailed in to the Collector of Internal Revenue?

A. That's right.

Q. And the information that was put down by him on this paper, Plaintiff's Exhibit 7 for identification, was that information furnished by you to him when he put it down on the paper?

A. Yes.

Q. Did you furnish him with the information to put under the heading, "Your credit for dependents, Tun Kim Wong and Tun Goon Wong"? Did you furnish that information to him?

A. I don't know the spelling, whether it is right or not, but I gave the names for him to write it down for me.

Q. What names did you give him for your two sons to put down?

(Testimony of Wong Ken Foon.)

A. Wong Hing Goon and Wong Hing Jin.

Q. When you gave that information to him, were you referring to your younger son and to the plaintiff who is sitting at the counsel table as your two sons? A. Yes.

Q. After this paper was handed to you, were there any changes made on this paper since 1944, or whatever date that [131] was upon which that was made out? Have there been any changes on it since you got the paper from the man that made it out? A. Not much change.

Mr. Talan: What was the answer?

Mr. Brennan: Not much change.

Q. Was there any change? Have you changed anything on it? A. No change.

Q. At the time you had this made out, did you give the person that made it out the original of Plaintiff's Exhibit No. 5, which is the statement of income tax withheld on wages, did you give the original of this to the man that made out the original of Plaintiff's Exhibit 7 for identification?

A. Yes.

Q. Did you keep Plaintiff's Exhibit 5 with you stapled to Plaintiff's Exhibit 7 for identification until you handed them to me yesterday?

A. Yes.

Mr. Brennan: At this time, for what it is worth, your Honor, we would like to introduce in evidence Plaintiff's Exhibit No. 7.

Mr. Talan: I object, your Honor, on the basis

(Testimony of Wong Ken Foon.)

that this is not the best evidence. We have no evidence that the original is not available.

The Court: Overruled. I think I can take judicial notice [132] of the fact that these forms are destroyed after a certain length of time. This may be introduced as Plaintiff's Exhibit 7.

The Clerk: So marked, your Honor.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 7.)

Q. (By Mr. Brennan): I will show you Plaintiff's Exhibit No. 8 for identification, headed, "U. S. Individual Income Tax Return for the Calendar Year 1944," which appears to be a carbon copy, and ask you if the original and this copy were made out in your presence? A. Yes.

Q. Do you remember who it was that made it out for you? A. I don't remember the name.

Q. Whoever it was that made it out for you, after he completed making the original and this out, did he give this paper to you that I am now holding, being Plaintiff's Exhibit 8 for identification? A. Yes.

Q. At the time this party made this out for you, did you furnish him with the information that is contained on this as to the name Wong Ken Foon, the address, and the name of the two sons along with the mother and wife that appear on here, Wong Tun Goon and Wong Tun Kim? [133]

A. Yes.

Q. At that time did you work for the Wong Jew

(Testimony of Wong Ken Foon.)

Produce Company at South Gate? A. Yes.

Q. Do you know what happened to the original of this paper that is Plaintiff's Exhibit 8 for identification? A. To the tax bureau it was sent.

Q. At the time this paper was made out, referring to Plaintiff's Exhibit 8 for identification, was there attached to the original of that, the original of Plaintiff's Exhibit 6? A. Yes.

Q. And at the time Plaintiff's Exhibit 8 was handed to you at the time it was made out by this party you are referring to, did you have attached to it or stapled to it Plaintiff's Exhibit 6?

A. Yes.

Q. From the time that it was handed to you in 1945, or whenever this was prepared, has it remained in your possession up until the time you handed it to me either yesterday, or it may have been possibly Friday of last week? A. Yes.

Q. Have you made any changes in Plaintiff's Exhibit 8 for identification since it was handed to you by the party that prepared it in your [134] presence? A. No.

Mr. Brennan: We offer in evidence for whatever it may be worth, your Honor, Plaintiff's Exhibit 8 for identification.

The Court: Same objection, same ruling. It may be received.

The Clerk: So marked.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 8.)

(Testimony of Wong Ken Foon.)

Q. (By Mr. Brennan): When you went to work for the Wong Jew Produce Company, did you give someone there the number of dependents you had? A. Yes.

Q. What dependents did you give them?

A. My wife, two sons, and my mother.

Mr. Brennan: That's all. Cross-examine.

Mr. Talan: We have no questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Brennan: At this time may the witness be returned to the witness room and may we have Mr. Frank Wong? [135]

WONG WING YEN

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Be seated and state your name.

The Witness: Wong Wing Yen.

Direct Examination

By Mr. Brennan:

Q. What is your address?

A. I live at 1725 West 41st Place, Los Angeles, California.

Q. Do you know Wong Wing Goon who is sitting at counsel table, and the party I am asking to rise? A. Yes.

Q. Where did you first see him?

(Testimony of Wong Wing Yen.)

A. In China.

Q. When?

A. About the end of the sixth month, 1946.

Q. Where in China did you see him?

A. At his home.

Q. Where was his home located, what village?

A. Nam On Village.

Q. Before you went to Nam On Village, did you live in the United States? [136] A. Yes.

Q. Did you know Wong Ken Foon in this country before you went to China? A. Yes.

Q. To identify him, is that the person who has been in the witness room with you and in and around the courtroom and in the halls here yesterday and today? A. Yes.

Q. That is the man that just went into the witness room as you came out just a few moments ago, is that correct? A. Yes.

Q. When you went to China in 1947, did he ask you to do something for him?

A. He gave me money to forward to his wife and some fountain pens for the children.

Q. Did he tell you where his wife and children were where you were to deliver these things?

A. Yes. He said at Nam On Village.

Q. To what village did you go on that trip before going to Nam On Village?

A. Nam Lok Village.

Q. How far is Nam Lok Village from Nam On Village? A. Half a li.

Q. Did you go to that village first before going

(Testimony of Wong Wing Yen.)

to Nam On Village? [137] A. Yes.

Q. How many times did you go to Nam On Village? A. Once.

Q. When you went to Nam On Village, what did you do when you got to the village about delivering this money and the fountain pens?

A. When I arrived at the village, I encountered some villagers, some person there, and I asked where they lived.

Q. You asked where who lived?

A. Because Wong Ken Foon asked me to bring something to the home to the mother of Wong Hing Goon, so when I arrived in the village, I asked the villagers where did they live, Wong Hing Goon's family.

Q. And was there a place pointed out to you by the villagers?

A. The villagers brought me to the row there and pointed out that the house over there is the house.

Q. Did you go to the house that was pointed out?

A. Yes.

Q. When you got to that house, who did you see around the house?

A. First the two sons. Later on one of the sons went in and summoned the mother out from the bedroom, I presume.

Q. Then after the one son left into another room, then the mother came out, is that right? [138]

A. I think one of the boys just merely got close

(Testimony of Wong Wing Yen.)

to the bedroom or inner room and say, "Mama, somebody is here to look for you."

Q. Then immediately after that were all three, the two boys and the woman, in the room?

A. Yes.

Q. Tell us what you said and what they said, just what happened there?

A. I told her that, "Your husband has given me $50 U.S. and two pens to be forwarded to you all."

Q. Was anything else said, any other thing said at that meeting?

A. The wife asked me how the husband is over in the United States at that time. I told her that his health was good and everything is fine, and he asked her not to worry about him.

Q. I show you Plaintiff's Exhibit 4 and ask you if you recognize the people in that picture.

A. The middle one is the mother and this is Hing Goon.

Q. Is that the boy sitting at counsel table?

A. Yes.

Q. Who is the other boy?

A. The younger brother.

Q. Are these three people you just pointed out the three that you saw in the house in Nam On Village in 1947? [139] A. Yes.

Q. I show you Plaintiff's Exhibit 3 and ask you if you have ever seen that picture or a picture like it in China. A. The middle one is the mother.

The Court: That is not the question.

(Testimony of Wong Wing Yen.)

The Interpreter: But that is the question he gave.

Mr. Brennan: Will you read the question, please?

(Question read.)

The Witness: No, I haven't seen this.

Q. (By Mr. Brennan): How long were you in this home on this trip? A. About 15 minutes.

Mr. Brennan: Cross-examine.

The Court: Well, before we start the cross-examination, maybe we'd better take our afternoon recess. We will recess until 5 minutes after 3:00.

(Recess.)

The Court: You may proceed. [140]

Cross-Examination

By Mr. Talan:

Q. Are you related to Wong Ken Foon?

A. A friend.

Q. How long have you known Wong Ken Foon?

A. About 10 years.

Q. Where did you first meet Wong Ken Foon?

A. I don't remember the exact time.

Q. Did you first meet him in China?

A. No.

Q. When you returned from this trip in 1947, to what city did you return in the United States?

A. I didn't come back in 1947.

Q. My question was, when you returned from

(Testimony of Wong Wing Yen.)

this trip that you made in 1947, to what city in the United States did you return?

A. I first landed in San Francisco.

Q. What was the date of your arrival in San Francisco? A. That I don't remember.

Q. Approximately.

A. Chinese New Year's, about Chinese New Year's time.

Q. Of what year? A. 1948, I returned.

Q. How did you travel back to the United States from China on that trip? [141]

A. By steamer.

Q. What was the name of the ship?

A. Cleveland.

Q. Did you have a certificate of identity?

A. Yes, I have one.

Q. Do you remember the number of it?

A. I don't know exactly which document you are referring to.

Q. What kind of a document did you have on this trip? A. Passport.

Q. What kind of a passport was this?

A. It was a greenish color, a booklet with my picture in it. There was a number through sort of a window cut on top of the cover there, but I can't recall the number.

Q. Was this a United States passport?

A. Yes, issued by the United States.

Q. How were you admitted back into the country?

(Testimony of Wong Wing Yen.)

A. Citizen. I left as a United States citizen, also.

Mr. Talan: I have no further questions, your Honor.

Mr. Brennan: No questions. May this witness be excused, your Honor?

The Court: You may be excused.

(Witness excused.) [142]

Mr. Brennan: If the Court please, that is the plaintiff's case with the exception that we raised Monday when we were in asking that the matter be set over. I don't know what your Honor's attitude will be, but we have, as I indicated, started the machinery as of Saturday in having the boy's mother, the wife of Wong Ken Foon, the wife of the alleged father, come to the United States. We feel that your Honor can have the advantage of her direct testimony and that it would be very helpful.

The Court: Before we talk about that, let's find out about the government case. You have rested your case. I don't know what testimony the government has.

Mr. Talan: We have no testimony, your Honor.

The Court: Then the case is submitted with the exception of the request of the plaintiff for a continuance in order to allow the mother to be brought here, is that correct?

Mr. Talan: Well, we are not willing to have this case continued.

The Court: I didn't say that.

Mr. Talan: You are correct.

The Court: I said with the exception of that request.

Mr. Talan: Yes. I am sorry. I misunderstood.

The Court: There is no further testimony?

Mr. Talan: No further testimony.

The Court: Mr. Brennan, I would be more than willing to [143] continue the case for the testimony of the mother, if I thought that testimony would be of any avail, but supposing the mother came over here and testified. She couldn't offset the testimony of the plaintiff, the boy. There were two hearings at the Immigration Service and as a result of both of those hearings, the investigation officers didn't believe the plaintiff ever lived in the village. I don't know if he lived in the village or not. But I am satisfied he doesn't know much about it. You can't tell me a boy can grow up in a community of 40 or 50 houses and not know the people who live next door, not know the people who live in which houses. I think human nature is about the same as it was 2,000 years ago. It doesn't change. I think a boy is a boy regardless of whether he is in China, the United States or Russia. Boys are always going around visiting. It seems improbable that a boy living in a community, growing up in a community for 20 years, wouldn't know the community in which he lives. It just doesn't add up.

If the mother would come over here and testify that this is the boy, still we have the conflict of testimony. We have the boy's own statement.

After all, we have to rely upon the statement of

the boy, particularly this statement of the boy about the last house to the east, Wong Wah See's house. The testimony of the father and the testimony of the son don't jibe at all. He said he went down there because there was a bachelor he [144] visited down there. The father not only testified here but testified at the immigration hearing that Wong Wah See was married, had two girls.

Also, the father testified here that originally Wong Wah See was about 50 years of age. Then he changed his testimony and said he meant 50 years of age now. So the way he figured, he would be about 30 years of age then. But I notice when he testified in the immigration hearing, he gave the age at the time of the visit of 50 years. It wasn't now, but at the time of the visit. The question was asked the father, "When you were last in China, who occupied the house standing by itself in the tenth row, that is the house at the tail end of the village?"

He said, "Wong Wah See."

Then he was asked, "How old was Wong Wah See when you were last in China?"

He said, "He was in his forties, nearly fifty."

Today he changed the testimony on us. He said he meant he was nearly 50 now.

He was asked if he any daughters and he said, "Yes, two daughters."

So the only thing he has done is change the testimony as to date. If the father testified correctly that Wong Wah See occupied that building, lived there with his wife, had two children, then I don't

know how we can believe the plaintiff's [145] testimony that he used to go down and visit with Wong Wah See because he was a bachelor.

Mr. Brennan: May I make a comment on that one thing, your Honor?

The Court: Yes.

Mr. Brennan: It has occurred to me, I noted that same apparent discrepancy, that the father left and last was in the village when the boy was six or seven years of age. It may be that we could have some light shed upon it, whether there were two separate occupants, one before the boy started visiting the bachelor in that location. Both may be referring to the same house and different families. The boy's recollection obviously starts some time, in all probability, after his father had left. Both statements could be true and we could reconcile them under that theory. The only one who would know what that situation continuously was up to the time they left would be the mother. On that very situation, it occurred to me the mother would be able to shed light.

As to the father's uncertainty of the age or, as you have indicated, a change of testimony, I don't think there could be any question in any of our minds but what the father was in that village.

The Court: Mr. Brennan, there is no question in my mind that there were two boys born to this father and the mother.

Mr. Brennan: In that village? [146]

The Court: In that village. Now the question comes up in all these cases whether or not there has

been a substitution. You remember the last witness you had here, he went there in 1947. He went down to see the mother. He was there for 15 minutes. He said he saw the mother and two boys. He never testified that the mother ever said, "These are my two sons." He never did say that. He just assumed that they were. The fact that the two boys were there is no indication that they were the children of the father here.

But the thing that bothers me is here is a boy who lived for 20 years in one house and right across the alleyway, it can't be more than 10 or 12 feet, is an aunt. He didn't even know the name.

Then he isn't certain, and time after time down in the immigration office he said, "I don't know the name of anybody in the village."

Mr. Brennan: Obviously on that there is no question but what under any theory that was not a correct statement, because he had given some, and then subsequent to that there were one or two names, as I recall the transcript, that came into existence.

One other thing, whenever the chart was referred to, he has always been able to identify from the chart, and apparently when they were questioning him as to where people lived or names of people that lived in certain houses on the [147] chart, there is no inconsistency whatsoever. He has had an opportunity to see the chart.

The Court: I think that the boy can go back to China where the mother is and with this testimony can then make application to the committee that is

sitting over there. The mother is there and maybe the mother can straighten out these discrepancies. There are entirely too many discrepancies in this case to allow me to admit the plaintiff.

Mr. Brennan: At the time of the hearing and I am sure the documents will bear this out, the mother and the boy were before the authorities, the consulate in Hong Kong, and when the mother and the boy were there, there were no discrepancies and apparently no difficulty in making a prima facie showing, so that if we have to go through that process again, we will run into exactly the same situation.

The Court: No. Because the law has been changed, Mr. Brennan. Under the McCarran Act, there is a new committee that is to process these cases. As far as I understand, these proceedings do not prohibit the boy at another time making an adequate showing, but it does mean he is going to have to go back there and make a showing under the new law and you will have the record there, have this testimony, and these discrepancies are going to have to be explained.

We have tried a number of these cases, I think about 20 of them now, 22 or 23, and the thing that impresses me always is the memory these folks have. They can usually remember the names and places and location of houses in the village, and the first born and what not. Now we have a boy here who lives in the community for 20 years. He doesn't remember. He gives an excuse. He has been away from the village so long. That is three or four

years. That doesn't have any effect on the rest of the Chinese boys.

I am amazed sometimes at how well they can remember. They can remember a great deal better than I can. It doesn't seem to me that the plaintiff in this case has established or has carried the burden to such an extent that we can say that he is the son of the alleged father. Either the father is not telling the truth or the boy is not. I am rather inclined to believe it is the boy, rather than the father.

Mr. Brennan: Of course it is as part of the burden that we would like to have the mother come over and give her testimony.

The Court: The mother couldn't in any way help out the testimony of the boy. All the mother can say is, "This is my boy. This is my son who lived in the village."

The mother is going to have to do one of two things. She is going to have to substantiate the testimony of the boy or she is going to have to describe the village and if she describes the village, then the question comes up on what the boy didn't [149] know.

The judgment in this case will be for the defendant.

I will say the judgment will be without prejudice for him to establish, if he can, in a proper procedure in China with the testimony of the mother this relationship. I am not taking that away from him.

I still think he has the right, if he can, to bring in the mother over there and allow the authorities to review the entire testimony we have before the

immigration authorities. It may be that these discrepancies can be explained away. If they can be, then he can be admitted.

You will prepare findings of fact. [150]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 14th day of September, 1953.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed October 1, 1953. [151]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 22, inclusive, contain the original Petition to Establish Nationality; Declaratory Judgment etc.; Answer; Stipulation and Order for Substitution of Herbert Brownell, Jr., as Party Defendant; Minutes of the Court for March 25, 1953; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Order Extending Time on Appeal and Designation of Record on Appeal which, together with Reporter's Transcript of Proceedings on March 24 and 25, 1953, and original Plaintiff's Exhibits 1 to 8, inclusive, and Defendant's Exhibit A, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12th day of October, A.D. 1953.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14080. United States Court of Appeals for the Ninth Circuit. Wong Ken Foon, as Guardian Ad Litem for Wong Hing Goon, Appellant, vs. Herbert Brownell, Jr., Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 13, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14406-HW

WONG KEN FOON, as Guardian Ad Litem for WONG HING GOON,

Appellant,

vs.

HERBERT BROWNELL, JR., as United States Attorney General,

Appellee.

STATEMENT OF POINTS AND DESIGNATION OF RECORD ON APPEAL

To the Honorable United States Court of Appeals for the Ninth Circuit:

Comes now the appellant, Won Ken Foon, as Guardian Ad Litem for Wong Hing Goon, and sets forth his statements on appeal and designation of the record on appeal as follows:

Statement

I.

The trial court erred in allowing in evidence the transcript of the immigration hearing in February, 1952, which said transcript incorporated questions and answers of a preliminary hearing in January, 1952.

II.

The court erred in indulging in conjecture in relation to the conduct of plaintiff Wong Hing Goon with regard to his habits of play and associations

in his native village in China rather than indicating evidence as actually adduced.

III.

The Court erred and abused its discretion in not permitting a continuance of the trial for the taking of the testimony of the mother of plaintiff.

IV.

The court erred in not declaring the plaintiff, Wong Hing Goon, a citizen of the United States, in view of the lack and failure of any evidence to the contrary adduced or introduced by the defendant.

Designation of Record

1. All of reporter's transcript of proceedings on trial.
2. Complaint.
3. Answer.
4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Notice of Appeal.
7. Order extending time to docket appeal.
8. Stipulation and order substituting party defendant.
9. All exhibits.
10. This Designation.
11. Any Designation by Appellee of additional portions of Record on Appeal.

/s/ WILLIAM E. CORNELL.

Dated: October 21, 1953.

[Endorsed]: Filed October 26, 1953.

No. 14080.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WONG KEN FOON, as Guardian *Ad Litem* for WONG HING GOON,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

BRIEF FOR APPELLANT.

BRENNAN & CORNELL,
458 South Spring Street,
Los Angeles 13, California,
Attorney for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WONG KEN FOON, as Guardian *Ad Litem* for WONG HING GOON,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

The plaintiff-appellant herein commenced the proceedings in the lower court under the provisions of Section 1993, Revised Statutes of the United States (Acts of April 14, 1802, and February 10, 1855, before amended by Act of May 24, 1934, Sec. 1, 8 U. S. C. A. 601(g)). (This Act has since been amended in 1952, but was the law applicable at the time plaintiff was born.) Such Act in as far as applicable to plaintiff reads as follows:

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of

the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

Jurisdiction is conferred upon the court below by the Act of October 14, 1940, Ch. 876, Title I, subchapter 5, section 503, 54 Stat. 1171 (8 U. S. C. A., Sec. 903). This section in as far as it is applicable to plaintiff provides as follows:

> "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *."

This statute was repealed in 1952, but was the pertinent jurisdictional law in effect at the time plaintiff's complaint was filed herein.

Statement of the Case.

Plaintiff, Wong Hing Goon, by and through his guardian *ad litem,* Wong Ken Foon, filed in the United States District Court for the Southern District of California, Central Division, a petition seeking a Declaratory Judg-

ment of United States citizenship. The action was brought pursuant to the Statute then in effect, to-wit: Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903). The appellant claims to have acquired United States citizenship at the time of his birth, in accordance with the United States Nationality Statute then in effect. The appellant, Wong Hing Goon, claims to be the lawful blood child of Wong Ken Foon. It was conceded by the defendant-appellee in the pleadings in paragraph II of their Answer [Tr. 8] and in the findings of the Court in paragraph III [Tr. 13], that Wong Ken Foon, the alleged father of the appellant herein, was admitted to the United States from China as the son of a native and on or about January 3, 1921, and was issued Certificate of Identity No. 32494 by the Immigration and Naturalization Service at San Francisco, California.

It was further conceded in the pleadings that Wong Ken Foon has been a permanent resident of the United States since November 26, 1920, when he first arrived in the United States on *S.S. Tjikemsang,* and that said Wong Ken Foon has made two trips from the United States to China. On the first trip he departed from San Francisco, California, September 27, 1926, via *S.S. President Taft,* and returned to San Francisco on October 5, 1927, via *S.S. President Grant.* On his second trip he departed from Los Angeles, California, July 10, 1932, via *S.S. President McKinley,* and returned to Los Angeles, California, August 21, 1933, via *S.S. President Grant.* [Tr. 4 and 8.]

The plaintiff herein arrived from China via airplane to the City of Los Angeles, California, seeking admission as the son of Wong Ken Foon. It was stipulated at the time of trial in the lower court that the American Consul in China had issued travel papers to the appellant without raising any objections, and the first objections were made when he arrived in the United States. [T. 33.] Upon the arrival of appellant on or about January 18, 1952, he was held by the Immigration and Naturalization Service pending a determination of his status. On February 15, 1952, a hearing was held before the Board of Special Inquiry of the Immigration and Naturalization Service at San Pedro, California. The Board of Special Inquiry denied appellant's application for admission and recognition as a United States citizen. The appellate administrative authority, the Board of Immigration Appeals, affirmed the decision excluding the appellant from the United States. Thereafter appellant, through his guardian *ad litem,* Wong Ken Foon, filed the judicial proceedings to have his claim of citizenship determined by the lower court.

The cause came to trial below without a jury. The appellant, his father, Wong Ken Foon, and two disinterested witnesses testified concerning the claimed relationship of appellant to his father Wong Ken Foon. The defendant-appellee presented no witnesses. The defense introduced as Exhibit "A" certain immigration records and transcript of proceedings before the Board of Special Inquiry, and other proceedings, which incorporated ques-

tions and answers of a preliminary hearing in January of 1952, and with reference to the Application of the Appellant for Admission before the Immigration Service. The lower court found for the defendant and it is from this judgment that the appellant prosecutes this appeal.

Statement of Points.

I.

The trial court erred in allowing in evidence the transcript of the immigration hearing in February, 1952, which said transcript incorporated questions and answers of a preliminary hearing in January, 1952.

II.

The Court erred in indulging in conjecture in relation to the conduct of plaintiff, Wong Hing Goon, with regard to his habits of play and associations in his native village in China, rather than indicating evidence as actually adduced.

III.

The Court erred and abused its discretion in not permitting a continuance of the trial for the taking of the testimony of the mother of plaintiff.

IV.

The Court erred in not declaring the plaintiff, Wong Hing Goon, a citizen of the United States, in view of the lack and failure of any evidence to the contrary adduced or introduced by the defendant.

Argument.

It now appears to have been clearly established that an action brought under Section 503 of the Nationality Act (8 U. S. C. A. 903) is an independent action and shall not be deemed to be review of any administrative board or hearing, and specifically would not be deemed a review of the proceedings before the Board of Special Inquiry, nor any preliminary hearing had in such proceedings, nor the proceedings before the Board of Immigration Appeals.

> *Lee Mon Hong v. McGranery* (D. C. Cal., 1953), 110 Fed. Supp. 682;
>
> *Wong Wing Foo v. McGrath* (C. A. Cal., 1952), 196 F. 2d 120 (Opinion by Chief Judge Denman of this court).

It is respectfully submitted that as the proceedings before the lower court were therefore in the nature of an independent proceeding, the trial court improperly admitted into evidence any proceedings before the Immigration and Naturalization Service, as it was an administrative board and the trial court should only have considered the testimony of the actual witnesses before it.

During the course of the trial below frequent reference was made to the transcript of a hearing before the Board of Special Inquiry in San Pedro on February 15, 1952, by the United States attorney. It is readily apparent that the defendant-appellee was basing its main defense upon the use of the transcript before this administrative board, and it would seem that this contention of the defendant influenced the Court in its decision. A rather extensive discussion between the trial court and the United States Attorney with reference to the transcript of the adminis-

trative hearing commences at page 62 of the Transcript of Record and continues for several pages. To substantiate appellant's contention that the United States Attorney was relying primarily upon this transcript of the administrative proceedings and that this influenced the Court, we find the following language:

> "The Court: In other words, your whole case or your theory was that he was not familiar with the village, is that correct?" [Tr. 64.]

The conversation between the Court and the United States Attorney continues on pages 65 and 66 of the Transcript of Record. From an examination of the record it appears that the Transcript referred to by the United States Attorney of the hearing before the Board of Special Inquiry on February 15, 1952, also included a preliminary hearing in January of 1952. No foundation was laid as to the type of hearing had in the preliminary hearing of January, 1952, nor anything other than counsel's statement as to the manner in which the hearing was conducted on February 15, 1952. The Transcript of the administrative proceedings was used throughout by the United States Attorney and occasionally by the Court. [Tr. 120.] The Transcript of the administrative proceedings was originally referred to as Defendant's Exhibit "A," for identification, and was ultimately admitted into evidence by the Court as Defendant's Exhibit "A." [Tr. 102.]

It is conceded by appellant that under certain circumstances books or records of account and records made in the regular course of business, which are properly certified official records, may be admitted in evidence for limited purposes under the provisions of 28 U. S. C., Section 1733, and 28 U. S. C., Section 1732. These sec-

tions are limited to the records of any department or agency of the United States or the records of any court of the United States made in the regular course of business. In an Opinion of this Court, rendered by Chief Judge Denman, in the case of *Wong Wing Foo v. McGrath* (1952), 196 F. 2d 120, the Court discussed this matter at length and distinguished Sections 1732 and 1733 of 28 U. S. C., as not being exceptions to the hearsay rule allowing the testimony of proceedings before an administrative board. In that case the Court specifically held that the trial court improperly considered the testimony before the Board of Special Inquiry. In discussing the admissibility of a transcript of the proceedings before the administrative board, this Court stated:

> "Hence his testimony before the Board of Special Inquiry, though between the same parties and on the same issue, is not admissible as the exception to the hearsay rule where such a witness is dead or otherwise not available."

In distinguishing Sections 1732 and 1733, 28 U. S. C., this Court further stated:

> "We cannot believe that either of these two cited sections were intended to abolish the rule considered *supra* which permits such use of testimony of a witness in another and different proceeding between the same parties and on the same cause of action only when that witness is shown to be dead or otherwise not available."

It is readily apparent in the instant case that the witnesses were not only available but were actually present in court during the trial of the action. Therefore, as they were not "shown to be dead or otherwise not available," the Court should not have admitted Defendant's Exhibit "A"

for identification, being a transcript of the administrative proceedings.

In furtherance of the contention of appellant that the transcript of the administrative proceedings was inadmissible in the trial below, Volume 20, American Jurisprudence, Section 686, at pages 578 and 579, states as follows:

> "The mere fact that testimony has been given in the course of a former proceeding between the parties to a case on trial is no ground for its admission in evidence. The witness himself, if available, must be produced the same as if he were testifying *de novo.* His testimony given at a former trial is mere hearsay. This rule applies to testimony given by all witnesses at the former trial whether they were expert or lay witnesses."

See also:

United States v. International Harvester Co., 274 U. S. 693, 47 S. Ct. 748, 71 L. Ed. 1302;

E. E. Yarbrough Turpentine Co. v. Taylor, 201 Ala. 434, 78 So. 812, citing R. C. L.;

Savannah, F. & W. R. Co. v. Flannagan, 82 Ga. 579, 9 S. E. 471, 14 Am. St. Rep. 183;

St. Joseph v. Union R. Co., 116 Mo. 636, 88 S. W. 794, 38 Am. St. Rep. 626;

New York C. R. Co. v. Stevens, 126 Ohio St. 395, 185 N. W. 542, 87 A. L. R. 884;

Madden v. Duluth & I. R. R. Co., 112 Minn. 303, 127 N. W. 1052, 21 Ann. Cas. 805.

In the *Application of Murra,* 166 F. 2d 605, a Petition for Naturalization was heard in open Court where the

witnesses were examined for the Court. The Court stated:

> "* * * the hearing before the court is not for the purpose of reviewing the recommendations of the Examiner; it is a hearing *de novo* and it is obvious that the court must decide the issues upon the testimony which it hears, and that neither the testimony heard by the examiner, his findings, nor his recommendation are of any consequence."

Likewise, this Court in *Lee Choy v. United States,* 49 F. 2d 24 at page 27, concluded that improper introduction of certain immigration records was reversible error. The Court stated:

> "It thus appears that the Court unconsciously allowed the erroneously admitted record to influence him in consideration of the case. This is a striking illustration of the danger of getting into the record evidence not admissible under well-recognized rules. If these records were controlling in the decision of the case, it would seem that the defendant should be discharged from custody. In Judicial proceedings the court is restricted in the reception of evidence to only such as meets the requirements of legal proof."

It is therefore respectfully submitted that the evil of permitting a transcript of proceedings before the Special Board of Inquiry and other administrative proceedings is that the Court will undoubtedly consider the statements and representations of the witnesses without having an opportunity to hear their actual testimony, or observe their demeanor, or determine properly the authenticity of their statements. It is also obvious that counsel do not have the right of cross-examination or direct examination in

such a proceeding, as in many cases an attorney is not even allowed or permitted for the applicant. In the proceedings before the lower Court, the Court should have only considered the actual testimony of the witnesses and not permitted itself to be swayed by the proceedings before the administrative board. It is, therefore, urged that the trial judge committed prejudicial error in admitting the entire immigration record as evidence.

During the course of the trial below, the United States attorney indulged in extensive cross-examination of the plaintiff with reference to his playmates in his home village in China and the physical location of the houses and alleys and neighbors in the home village. Again he made extensive reference to the transcript before the administrative board. Apparently he was laying great stress upon alleged lack of knowledge of the plaintiff of his playmates and neighbors, which position he stated at length to the Court. [Tr. 65.] It appears that the trial Court placed great reliance upon this fact in questions asked by the Court. [Tr. 71, 72, 73.] The Court further inquired of plaintiff concerning the background in the village and with reference to the transcript of the administrative proceedings, which appeared to confuse the witness. [Tr. 90 through 95.] It appears that the Court was indulging in conjecture with reference to the habits of the plaintiff, rather than listening to his direct testimony. At one point the Court stated:

> "The Court: Well, this question here says he didn't know the name of anybody in the village and, not only that, but he said it two or three times. He emphasized it. It is inconceivable how a youngster could live in a village of 40 or 50 houses for 20 years and then say he doesn't know anybody that lived in

> the village. If it was an American youngster, he would be in every one of the houses and probably could tell you more about the life history of the people than they could themselves." [Tr. 92.]

This appears again to be an example of the evil of permitting the use of the transcript of the administrative proceedings, rather than the Court observing the demeanor of the witness and listening to his actual testimony. Finally at the conclusion of the trial, the Court commented at length on the fact that plaintiff did not appear to know the names of the people in the village nor his playmates. [Tr. 140.]

It is therefore submitted that the trial Court committed prejudicial error in indulging in conjecture concerning the playmates and knowledge the plaintiff had of his own village, and by referring to testimony and statements in Defendant's Exhibit "A," being the transcript of the administrative proceedings.

At the conclusion of the trial, Bernard C. Brennan, attorney for plaintiff, requested a brief continuance for the purpose of bringing the mother of plaintiff to the United States to testify, and stated he had already undertaken proceedings to bring her to this country. [Tr. 139.] Mr. Brennan set forth his reasons for the motion to clear up an apparent discrepancy with reference to the residence of a person in China. [Tr. 142 and 145.]

As the Court apparently was relying so heavily on the transcript of the administrative proceedings with reference to the background of plaintiff, it is respectfully submitted that the Court abused its discretion in not permitting a brief continuance to hear the testimony of the mother of plaintiff as to the background of the village

and the physical facts that could be adduced by her testimony. This was the primary reason for her testimony and not as the Court stated that she would merely testify that plaintiff was her son. [Tr. 140.]

Appellant contends that he is a citizen and national of the United States. Statutes of the United States in effect at the time of the birth of this appellant specifically provided that the foreign born child of a Unied States citizen acquired Unitied States citizenship at birth. As this Court has previously stated, *Jung You v. Nagle,* 34 F. 2d 848, 851:

> "* * * Question in the case of applicants who claim citizenship by reason of sons or daughters of an American citizen is the question of paternity."

Thus, once the relationship of the appellant to the said Wong Ken Foon, his alleged father, a recognized United States citizen, has been established by evidence of record, the appellant must be deemed to have acquired United States citizenship in accordance with the provisions of that statute. The claim to United States citizenship having been established, the appellant is entitled to a declaratory judgment of United States nationality.

Acheson v. Yee King Gee, 184 F. 2d 382;

Wong Gan Chee v. Atcheson, 95 Fed. Supp. 816;

Toy Teung Kwong v. Acheson, 95 Fed. Supp. 745.

The sole issue, therefore, is whether the applicant, or appellant herein, is the son of a United Stats citizen. See *Quan Toon Jung v. Bonham,* 119 F. 2d 915, 916. Relationship is the sole issue. *Yep Suey Wing v. Berkshire,* 73 F. 2d 745, 746.

The appellant as plaintiff in the court below had the burden of proof as to the affirmative issues raised by the pleadings. Since the appellee concedes the United States citizenship of Wong Ken Foon, the only issue before the court was the relationship of Wong Hing Goon to the said Wong Ken Foon. See *Tillinghast v. Flynn,* 38 F. 2d 5; *Dong Rh Lon v. Proctor,* 110 F. 2d 808, 809.

It is not necessary that the appellant's evidence be uncontradicted, nor that the evidence most favorable to his contention carry conviction beyond a reasonable doubt. The *quantum* of evidence, in whose favor it preponderates, shall be determinative as to whether the evidence sustains the burden of proof.

See:

Lilienthal's Tobacco v. United States, 97 U. S. 237, 24 L. Ed. 901, 905.

If the party having the burden of proof establishes a *prima facie* case, the burden of evidence is shifted to the adverse party. (31 C. J. S. 719.) Did this plaintiff-appellant establish a *prima facie* case?

Wong Ken Foon, the alleged father of plaintiff herein, testified in the court below that he married Ng Shee (referred to as Eng Shee in the petition) September 28, 1926, in Nam On Village where he was born. [Tr. 27.] He further testified that plaintiff was born June 24, 1927, in Nam On Village. [Tr. 28.] He identified plaintiff herein, who was in the court room, as the boy that was born on said date. [Tr. 28.] He further testified that when he returned to China he again saw his son, plaintiff herein, who was living in the family home in the same village as when he left China previously. [Tr. 29-30.] In corroboration of his testimony he stated he reported

the birth of his son, Wong Hing Goon, plaintiff herein, to the immigration authorities. [Tr. 31.] He also testified concerning his second trip where he reported he had two children, again mentioning plaintiff herein. [Tr. 31-32.] The alleged father, Wong Ken Foon, further testified that he recognized the plaintiff herein from a photograph sent by his wife from China. [Tr. 35-36.]

The plaintiff, Wong Hing Goon, testified that he was born in Nam On Village in Hoy Shan district and Kwangtung Province, June 24, 1927. [Tr. 39.] He testified that when he arrived in Los Angeles, California, from China he met Wong Ken Foon and recognized him as the person he had seen in the village and as his father. [Tr. 41.] He further testified that he lived in the home village with his mother and younger brother, and that his mother had identified Wong Ken Foon as his father when he was in the village on the last occasion the father visited the family. He identified a woman from a photograph previously identified as the wife of Wong Ken Foon as his mother. [Tr. 42-43.] He further testified that he recognized the man in the picture as Wong Ken Foon, the alleged father herein [Tr. 43], and that he also recognized him at the airport when he arrived at Los Angeles, California, from China. He further testified that he recognized this man as his father from the time he was six or seven years of age, and that his mother's name was Ng Shee. [Tr. 44.] He further identified another photograph as including himself, his mother and his younger brother [Tr. 47], and that the woman shown in both photographs, namely, Plaintiff's Exhibits 3 and 4, was his mother in each case. [Tr. 48.]

Russell K. Fong, testifying on behalf of plaintiff, stated he was a public accountant. [Tr. 105.] He stated

he was the accountant for the employer of Wong Ken Foon and brought certain records with him to court relating to withholding tax deductions for Wong Ken Foon, and after identifying the Social Security number, he testified that under the heading of dependents Wong Ken Foon had listed four. [Tr. 106.] He further stated that on the records of the employer, four dependents were shown from 1943 through 1949. [Tr. 109.] His testimony would corroborate the testimony earlier of Wong Ken Foon, that by listing four dependents it included himself, his wife, and his two children born in China.

Wong Wing Yen, testifying on behalf of appellant, stated he knew appellant Wong Hing Goon, who was identified as sitting at the counsel table in the court below [Tr. 133], and that he had seen him in China in 1946 in his home village of Nam On. [Tr. 134.] He further testified that he knew Wong Ken Foon and that when the witness went to China Wong Ken Foon asked him to do him a favor by giving money to his wife and some fountain pens to the children. [Tr. 134.] He further testified that when he arrived in the home village he inquired of the villagers where "Wong Hing Goon's family" lived, and that the villagers pointed out the family home to him. [Tr. 135.] He identified from a photograph [Pltf. Ex. 4] the woman as the mother of appellant herein and identified appellant as the boy sitting at the counsel table during the trial. [Tr. 136.] We thus have positive identification by an independent witness not related to the alleged father or the plaintiff herein.

It might be observed that although plaintiff had the burden of proof in the suit below, this type of burden does not raise a presumption that the plaintiff or his witnesses will commit perjury.

> *Lee Mon Hong v. McGranery* (1953), 110 Fed. Supp. 682.

The testimony above set forth of the appellant and his father clearly expresses a father and son relationship. It was stated by Judge Wilbur in the case of *Gung You v. Nagle,* 34 F. 2d 848 at page 852:

> "Relationship is now usually proven by physical facts, and never is where the mother does not testify, but by pedigree, reputation in the family and by the conduct of the parties, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligation involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parent and child is evidence to the contrary. Such evidence is not collateral evidence, it is direct and material evidence on the issue."

The testimony of the appellant and his father standing alone would be sufficient to establish a *prima facie* showing of the claimed relationship. This pedigree evidence, if uncontradicted by other evidence, is sufficient to sustain the issue it covers. Such testimony is entitled to consideration in arriving at a decision in this matter. This Court has previously stated:

> "He took the stand and testified to his own belief concerning his place of birth. This evidence of

course, was hearsay, but nevertheless, it is the type of hearsay which is permitted. U. S. v. Wong Gong (C. C. A.), 70 F. 2d 107."

Lee Hin v. United States, 74 F. 2d 172, 173.

Also see:

Ex parte Delaney, 72 Fed. Supp. 312, aff. 170 F. 2d 239.

The same view was expressed by this Court in *United States v. Wong Gong,* 70 F. 2d 107:

"The testimony of the wtiness as to the date and place of his birth is, of course, hearsay, but it is competent. *Wignore on Evidence,* p. 1501; *United States v. Tod* (C. C. A.), 296 F. 345."

The Court of Appeals for the First Circuit stated that in the absence of official records, statements of the parents concerning their children should be considered as reliable.

O'Connell v. Ward, 126 F. 2d 615, 620.

The evidence offered by appellant to establish his claim to United States citizenship cannot be wholly disregarded without sufficient reasons.

See:

Wong Kam Chong v. United States, 111 F. 2d 707, 712;

Lau Hu Yuen v. United States (9 Cir.), 85 F. 2d 327.

Likewise, any slight discrepancy should be disregarded.

See:

Young Lee Gee v. Nagle, 53 F. 2d 448;

Jung Yen Loy v. Cahill, 81 F. 2d 809, 813.

It was stated by the Court of Appeals for the First Circuit in *Ward v. Flynn,* 74 F. 2d 145 at page 146:

> "* * * to reject sworn, consistent, unimpeached and uncontradicted testimony, there must be a real reason which would be regarded as adequate by fair minded persons."

The appellant identified himself by direct and positive evidence as the lawful son of a recognized United States citizen. The lawful son of a recognized United States citizen is legally entitled to a declaratory judgment of United States citizenship. (8 U. S. C. A. 903.) It is submitted that the decision of the lower court was in error.

Conclusion.

It is respectfully submitted that the proceedings in the lower court was an independent trial in the matters framed by the pleadings and was not a review of the administrative hearing. As a consequence, the Court erred in admitting into evidence the transcripts and proceedings before the administrative board and permitting itself to be influenced thereby, and that the admission of such administrative proceedings was prejudicial error. Defendant's Exhibit "A" was inadmissible and incompetent evidence and should have been excluded. In conjunction with this Exhibit "A" of the defendant-appellee, the Court should not have indulged in conjecture with reference to the playmates and physical surroundings of plaintiff in his home village, and committed prejudicial error and abuse of discretion thereby.

Appellant established his claim to United States citizenship by a fair preponderance of evidence and no testimony was introduced on behalf of defendant-appellee. It is, therefore, respectfully requested that the judgment of the lower court be reversed, and that appellant be declared a United States citizen and/or national.

Dated: January 11, Los Angeles, California.

Respectfully submitted,

BRENNAN & CORNELL,

By WM. E. CORNELL,

Attorney for Appellant.

No. 14080.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WONG KEN FOON as Guardian *Ad Litem* for WONG HING GOON,

Appellant,

vs.

HERBERT BROWNELL, JR., Attorney General of the United States,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT K. GREAN,
Assistant United States Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Appellee.

BRIEF FOR APPELLEE.

I.

JURISDICTIONAL STATEMENT.

The District Court had jurisdiction of the action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C., Sec. 903).

Judgment for the defendant was entered April 9, 1953, and the jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C., Sections 1921 and 1294(1).

II.
STATEMENT OF THE CASE.

Appellant seeks admittance to the United States as blood son of a citizen of the United States under the provisions of 1993, Revised Statutes of the United States.

The lower court has determined that the appellant has not sustained his burden of proof and has determined that the appellant is not a citizen or national of the United States [T. R. 15, 17].

III.
STATEMENT OF FACTS.

Wong Ken Foon, the alleged father of the appellant, was admitted to the United States, as the son of a native, at San Francisco, California, on December 27, 1920, he having been born in China and having first arrived in the United States on November 26, 1920.

Wong Ken Foon has made two trips from the United States to China. On the first trip he departed from San Francisco, California, September 27, 1926, and returned to San Francisco on October 5, 1927. On his second trip he departed from Los Angeles, July 10, 1932 and returned to Los Angeles, August 21, 1933.

All of the foregoing facts have been conceded by the pleadings [T. R. 4, 8].

The appellant came to the United States for the first time via airplane to the City of Los Angeles, California, in January, 1952. He came on travel papers (not a passport) issued by the American Consul in China [T. R. 33].

Upon the arrival of the appellant, on or about January 18, 1952, he was held by the Immigration and Naturalization Service pending a determination of his status. On February 15, 1952, after hearings before the Board of Special Inquiry of the Immigration and Naturalization Service at San Pedro, California, said Board denied the appellant's application for admission and recognition as a United States citizen. The decision of the Board of Special Inquiry, excluding the appellant from the United States, was affirmed by the Board of Immigration Appeals. Thereafter, appellant, through his Guardian *Ad Litem* Wong Ken Foon, filed the judicial proceedings to have his claim of citizenship determined by the District Court.

The appellant was allegedly born in Nom On village, Kwangtung Province, China, on June 24, 1927, the alleged issue of the marriarge of Wong Ken Foon and Eng Shee, allegedly married on September 28, 1926, in the same village [T. R. 4, 39].

The appellant is alleged to have lived in the village in which he was born from the date of his birth until 1948, a period of twenty-one years, living in the same house, in the same village until he departed in 1948 for Hong Kong, preparatory to coming to the United States [T. R. 39-40, 49].

At the trial of the issues appellant presented, in addition to his own testimony, the oral testimony of the alleged father, testimony of an accountant, that prepared the Withholding Tax Employee's Receipt for Wong Ken Foon's employer, and one Wong Wing Yen, who visited appellant's home in China for about fifteen minutes in 1946, where he saw appellant for the first time [T. R. 137].

IV.

QUESTIONS INVOLVED.

The major question raised by Appellant's Brief is whether or not the trial court erred in allowing in evidence the transcript of testimony of the plaintiff at the immigration Hearings in February, 1952.

Other questions raised by appellant may be stated thusly:

> Did the Court rely upon conjecture in relation to the conduct of the appellant?
>
> And, did the appellant sustain his burden of proof?

V.

ARGUMENT.

A. The Court Properly Received in Evidence the Transcript of Appellant's Testimony Before the Board of Special Inquiry of the Immigration Service.

At the outset of the trial the following colloquy took place:

> "Mr. Talan: May we also have entered the record of the administrative proceeding, and a stipulation that it is authentic and a true and correct copy of the hearing that was reported therein?
>
> Mr. Brennan: Yes, subject to our calling to the court's attention any discrepancies that might have occurred by reason of the interpreter's translation. We have no question about the authenticity of the record or its correctness as interpreted, and we are not raising any technicality on getting the record in, but we are not stipulating as to the accuracy of the transcript and of the interpeter's remarks.
>
> Mr. Talan: That is accepted." [T. R. 21-22.]

When upon cross-examination appellant's counsel wished to use the transcript of appellant's previous testimony, he offered it for identification, and it was marked Defendant's Exhibit A for identification [T. R. 50].

The court made inquiry as to when and where the transcript was made and questioned counsel for appellee to determine that it was a true transcript of the hearing and not a summary [T. R. 62-63].

Later, during the cross-examination of the appellant, and toward the end thereof, Defendant's Exhibit A for identification was offered in evidence. There was no objection by appellant's counsel, and the exhibit was received in evidence [T. R. 102].

Where appellant's testimony during the trial differed from that contained in the transcript of his previous testimony, as contained in Exhibit A, the question and answer was first called to the attention of the appellant, that is, the question was read to him, together with his answer, and he was asked if that question was asked and if that was his answer. In almost every case the appellant admitted that the question and the answer read to him was his previous testimony. Wherever he felt it necessary he tried to explain why his previous answer differed from that now given before the court.

His previous testimony was admissions of the appellant, a *party* to the action, present in court, with an opportunity to explain the previous statements now conflicting with his present testimony.

Appellant now contends that because an action brought under Section 503, the Nationality Act, 8 U. S. C., Section 903, is an independent action, any of appellant's statements

before the Administrative Hearing are not admissible, merely because they were given in an Administrative Hearing.

This is fallacious reasoning. We are not dealing with testimony of third persons given in another action, and the reliance of the appellant on *Wong Wing Foo v. McGrath,* 195 F. 2d 120 (C. A. 9, 1952), is misplaced. In that case the testimony of an alleged uncle in an Administrative Hearing was sought to be introduced as evidence without the uncle being called to testify as a witness. He was available to testify. His testimony was clearly hearsay. He was not a party to the action and the court held that the exception to the Hearsay Rule, where such a witness is dead or otherwise not available, was not applicable. The inadmissibility of the uncle's testimony was obvious. There was no opportunity for him to be cross-examined on his previous testimony.

It can be assumed with certainty that the court in the *Wong Wing Foo* case did not intend to lessen the value of a *party's* admissions merely because they arose in an Immigration Hearing before the Administrative Board.

As stated in *Milton v. United States,* 110 F. 2d 556, 560 (C. A. D. C., 1940): Evidence offered to prove admissions need not have been given in a courtroom or under oath but the fact that it was so given, does not detract from its admissibility.

See also:

Warde v. United States, 158 F. 2d 651 (C. A. D. C., 1946).

And particularly:

Schoeps v. Carmichael, 177 F. 2d 391 (C. A. 9, 1949),

in which Judge Bone in a footnote No. 11, at page 397, enunciates completely the proposition stated above.

Wigmore in Volume IV, page 4 of his works on *Evidence* (3rd Ed.) states:

> "The Hearsay Rule, therefore, is not a ground of objection when an opponent's assertions are offered *against* him; in such case, his assertions are termed admissions."

Wigmore states that the probative value of admissions is twofold:

First, all admissions may furnish, as against the opponent, the same discrediting inference as that which may be made against a witness in consequence of a prior self-contradiction; and

Second, all admissions, used against the opponent, satisfy the Hearsay Rule, and when once in, have such testimonial value as belongs to any testimonial assertion under the circumstances.

> "* * * an admission is equivalent to affirmative testimony for the party offering it."
>
> IV *Wigmore on Evidence,* Sec. 1048, p. 6.

Previous statements of the party to an action, conflicting with his testimony, constitute substantive evidence against him.

> *Harrison v. United States,* 42 F. 2d 736 (C. A. 10, 1930).

Not only are the courts consistent in ruling upon the admissibility of admissions, but they emphasize the probative value thereof or as Wigmore says:

> "An admission is equivalent to affirmative testimony for the party offering it."

The Court in *Harrison v. United States, supra,* states that such testimony constitutes substantive evidence while the Court in *Milton v. United States, supra,* states at page 560:

> "Admissions have probative value, not because they have been subjected to cross-examination and therefore satisfy the Hearsay Rule, but because they are statements by a party opponent inconsistent with his present position as expressed in his pleadings and testimony."

Thus, we see that not only was Exhibit A admissible, but it was equivalent to *affirmative testimony* for the party offering it.

Bearing in mind that appellant's counsel stipulated that the record of the Administrative Proceedings was an authentic and true and correct copy of the hearing that was reported therein, and that counsel raised no objection to its being offered in evidence, he now claims, however, that it was inadmissible.

Appellant stated in his Brief at page 8 thereof that "the witnesses were not only available but were actually present in court during the trial of the action. Therefore, as they were not 'shown to be dead or otherwise not available,' the Court should not have admitted Defendant's Exhibit 'A.' * * *"

The very reasons that make the prior admissions admissible, to-wit, the presence of the party to testify before the court, to be cross-examined, and to explain his previous inconsistent statements being used against him, are the reasons why such testimony is admissible.

Judge Wyzanki of the District of Massachusetts discusses the problem in *United States v. United Shoes Ma-*

chinery Corporation, 89 Fed. Supp. 349, at 351-352 he states:

> "It has sometimes been erroneously said that extra-judicial admissions are receivable against a party as an exception to the hearsay rule and that the reason for the exception is either because in that party's eyes the statement must at one time have seemed trustworthy or because it is only fair to put upon that party the burden of explaining his own declaration. But the masters of the law of evidence now agree that this is not the correct rationale. *Morgan, The Rationale of Vicarious Admissions,* 42 Har. L. Rev. 461; *Wigmore, Evidence,* 3d Ed., §1048. See *Napier v. Bossard,* 2 Cir., 102 F. 2d 467, 468; *Milton v. United States,* 71 App. D. C. 394, 110 F. 2d 556, 560. Unlike statements of fact against interest (sometimes loosely called admissions), an extra-judicial admission of a party is receivable against him not as an exception to the hearsay rule but as not being within the purpose of the hearsay rule. The hearsay rule is a feature of the adversary system of the common law. It allows a party to object to the introduction of a statement not made under oath and not subject to cross-examination. Its purpose is to afford a party the privilege if he desires it of requiring the declarant to be sworn and subjected to questions. That purpose does no apply, and so the hearsay rule does not apply, where the evidence offered against a party are *his* statements."

Thus appellee finds no fault with the case citations of the appellant on pages 9 and 10 of his Brief, other than the fact that they apply to cases where testimony is offered in place and stead of the witness who is available. They have no application to the instant use by the appellee of admissions.

Appellant states at page 10 of his Brief:

> "It is therefore respectfully submitted that the evil of permitting a transcript of proceedings before the Special Board of Inquiry and other administrative proceedings is that the Court will undoubtedly consider the statements and representations of the witnesses without having an opportunity to hear their actual testimony, or observe their demeanor, or determine properly the authenticity of their statements."

How can this be applicable to the instant case?

Here the Court had an opportunity to hear the actual testimony of the appellant, to observe his demeanor, and to hear his explanation for statements previously made which differed from those presently made.

Counsel for the appellant goes on to say at page 11 of his Brief: "In the proceedings before the lower Court, the Court should have only considered the actual testimony of the witnesses and not permitted itself to be swayed by the proceedings before the administrative board."

Thus, counsel desires to limit trials to mere testimony of the witnesses without opposing counsel to have the opportunity to say to the witness: "You say this now, but on such and such a date, before such and such parties, you said this."

This is obviously tenuous reasoning and appellant should be called upon to explain any difference between his present position and the position he took under oath upon another occasion.

B. Inherent Improbability in the Statements of the Appellant.

It was in 1891 that Justice Field of the Supreme Court of the United States, in the case of *Quock Ting v. United States,* 140 U. S. 417, first stated at page 420:

> "There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. * * *"

Such inherent improbability is present in the statements of the appellant. He has testified that he was born in Nam On village, and has lived there all his life, a period of 21 years before going to Hong Kong in 1948, preparatory to coming to the United States. Nam On village is a village of 40 or more families. They live in 40 or more houses in the village. Yet the appellant testified before the Immigration Board of Inquiry, again and again, that he did not know the name of any member of the village except the person who owned the house at the tail-end of the village. This testimony appears at page 8 of Exhibit A and is called to the appellant's attention at page 78 of the Transcript of Record. He further testified that he could not remember who occupied the house next door to the one in which he claims he lived.

At page 80 of the Transcript of Record, appellant's attention is called to page 9 of Exhibit A and he was asked whether he gave the following answer to the following question:

> "Do you mean to say that you lived 21 years of your life in your house in Nam On village and can't tell us positively who occupied the house connected to it with a common wall, when you only left there 4 years ago?

There are so many houses in the village, I just can't remember."

Appellant at the trial answered "Yes."

One occupant of the village the appellant remembers. He is Wong Wah See who lived at the tail-end of the village. Appellant testified that he remembered the owner of that house because Wong Wah See is a bachelor, a little bit older than the appellant, whom he visited all the time [T. R. 79].

The alleged father Wong Ken Foon testified that Wong Wah See was married, had a wife and two daughters. He testified before the Board of Special Inquiry that Wong Wah See was in his fifties when the witness was last in the village of Nam On in the year 1933. When the testimony of the appellant was called to the attention of Wong Ken Foon he stated that he was talking about the age of Wong Wah See at this time which would be about 50. The Court then asked at page 120 of the Transcript of Record:

"Court: How many years ago was it when you were in China?

Witness: About 20 years ago.

Court: So when you were in China he was about 30 then?

Witness: I thought he was in his 30's, I never asked his age."

Appellant admitted in his testimony at the trial [T. R. 76] that he was asked in the Board of Inquiry hearing the following question:

"Q. According to your testimony, you lived in this same village, in the house in which you were

born, from the time of your birth until C. R. 37 (1948), or a total of 21 continuous years. Now you tell us that you are unable to state who lived in the house right next to yours during that time. Do you expect us to believe that statement? A. I never paid attention to other people in the village. I just knew our own house and the household members."

Appellant admitted that that was his answer.

This Court cannot say, as it did in *Mar Gong v. Brownell,* No. 13787, January 12, 1954, that this testimony does not relate to the basic issue whether Wong Ken Foon sired the plaintiff. For as stated by Judge Wilbur in the case of *Gung You v. Nagle,* 34 F. 2d 848, at 852:

> "* * * The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligation involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parent and child is evidence to the contrary. *Such evidence is not collateral evidence, it is direct and material evidence on the issue."*

Here then is evidence that the appellant did not live all his life in Nam On village as he would request us to believe. It is direct and material evidence on the issue. He claims to have lived for 21 years in the same village in which he was born, the village in which his alleged parents have their home. Yet he does not remember any of the occupants of the village. His statements are so inherently improbable as to induce the Court to disregard his evidence, even in the absence of any direct conflicting testimony.

As stated by Justice Field in the *Quock Ting* case, *supra:*

> "He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. * * * All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

Other inconsistencies appear in the testimony of the witnesses. Appellant contradicts himself as to the members of the household in his village home, and Wong Ken Foon's testimony as to the members of the household differs at various times [T. R. 51, 115-116].

Wong Ken Foon has not seen the appellant, his alleged son, for some period of 19 years. However, he produces testimony that he took four dependents relating to his withholding tax deductions. While the names he gives thereon for his alleged children are similar to those they now use, yet they differ materially. And, when he enumerates those who he claims dependents, he names them at page 133 of the Transcript of Record as "my wife, two sons, and *my mother.*"

Thus, if Wong Ken Foon included his mother as a dependent, there would be five dependents in the Withholding Tax exemptions since the witness is counted as one dependent. Thus, it would appear that the testimony which he uses to corroborate the size of his family is over-stated.

The testimony of Wong Wing Yen adds very little to the picture since by his own statement he saw the family

which he had never seen before, for a period of fifteen minutes, and testified to no statements of relationship that were made by the alleged mother or by the appellant.

In this case, this Court should have no difficulty in the application of the rule that the findings made by the trier of facts which refuse to credit a witness' testimony even though that testimony is not contradicted, should be upheld. *National Labor Relations Board v. Howell Chevrolet Co.,* 204 F. 2d 79, 86. The appellant, and his alleged father are interested witnesses, and when viewed in this light their mere say so does not have to be accepted. (*Flynn ex rel. Yee Suey v. Ward,* 104 F. 2d 900, 902; *Heath v. Helmick* (9th Cir.), 173 F. 2d 157, 161.)

In the *Mar Gong* case, this Court chose to give a "quantatitive and impersonal measure to the testimony" contained in the record. (The language is that of Wigmore.) And to paraphrase the language of Judge Sandborn of the Eighth Circuit in *Knowland v. Buffalo Insurance Co.,* 181 F. 2d 735, 739, this Court imputed to the trial court a disregard of his duties and responsibilities for a want of diligence or perspicacity in evaluating the credibility of witnesses and the weight of evidence. It would seem that the Court in that case pin-pointed the discrepancies to determine the weight of each one rather than to determine the overall picture of all the testimony and the credibility and probability of said testimony given by the witnesses.

In the instant case, however, such doubt is thrown upon the appellant's claim that he was born and raised in the village of his alleged family, and was residing there with them until he reached the age of twenty-one years, as to make his membership in that family an improbability. For

this reason, when appellant's counsel sought a continuance to enable him to bring the alleged mother of the appellant to the United States to testify (a task which counsel thought would take but a short time) the trial court in his discretion denied the continuance on the ground that her testimony would be merely cumulative and would not cure the improbability of the appellant ever having lived all of his life in a village where he could not remember the name of his next door neighbor. This, it is submitted, is a proper exercise of discretion. And the Court's colloquy with counsel regarding said continuance may be found at page 140 of the Transcript of Record.

C. Cases Cited by the Appellant.

Counsel for appellee would be remiss in his duty to this Court if he did not distinguish the cases cited by the appellant and call the Court's attention to their inapplicability.

The misapplication of *Wong Wing Foo v. McGrath, supra,* has already been called to the Court's attention elsewhere in this Brief. For the reasons given with regard thereto the cases cited on page 9 by the appellant in his Brief are likewise inapplicable.

The cases of *Acheson v. Yee King Gee,* 184 F. 2d 382; *Wong Gan Chee v. Acheson,* 95 Fed. Supp. 815; and *Toy Teung Kwong v. Acheson,* 97 Fed. Supp. 745, are cited at page 13 of appellant's Brief in support of the statement:

> "That once the relationship of the appellant to the said Wong Ken Foon, his alleged father, a recognized United States citizen has been established by evidence of record, the appellant must be deemed to have ac-

quired United States citizenship in accordance with the provisions of that statute. The claim to United States citizenship having been established, the appellant is entitled to a declaratory judgment of United States nationality."

However, in each of these three cases the *relationship* of the plaintiffs to the putative fathers *was conceded* and the sole question before the court was whether the father had sufficient residence in the United States to comply with the statute and to thus confer citizenship on their children. The claim to citizenship referred to by the court in each of the three cases was that of the fathers, and not the claim of the alleged children. It is submitted these cases have no application here.

At the bottom of page 13 of appellant's Brief he concludes that the sole issue therefor is one of relationship and cites *Quan Toon Jung v. Bonham,* 119 F. 2d 915, 916, and *Yep Suey Wing v. Berkshire,* 73 F. 2d 745, 746. However, inherent in the question of relationship is the matter of identity. Who is the person who claims to be the son of a citizen father? Can it be this appellant, who cannot remember the names of occupants of a village of a mere 40 families? A village wherein he was born and resided for 21 years?

Appellant on page 14 of his Brief submits that he has made a *prima facie* case. The burden of going forward consequently shifts to the defendant. He cites *Lilienthal's Tobacco v. United States,* 97 U. S. 237. However, Judge Garrecht, speaking for this Court in *Mui Sam Hun v. United States,* 78 F. 2d 612, in an opinion subscribed to

by Judges Wilbur and Denman without dissent, at page 615 said:

> "The rule is not, as appellant contends, that the applicant need only make out his case by a fair preponderance of the evidence, for it is not encumbent upon the Government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the Board is the sole judge of credibility of the witness, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary and capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the Board."

Judge Goodman and Judge Dal M. Lemon have both recognized that the burden is not met by a mere preponderance of evidence, the evidence must be "clear and convincing."

VI.
CONCLUSION.

To briefly summarize then, appellee's contentions, the following points should be made:

(1) Defendant's Exhibit "A" was admissible and was competent evidence. "An admission is equivalent to *affirmative testimony* for the party offering it."

In *Wong Wing Foo, supra,* the Court stated: "At the trial below plaintiff and Wong Yem, his alleged father, a citizen, testified and the testimony they gave before the Board of Special Inquiry was also admitted with the consent of the plaintiff." Thus the testimony of the two witnesses before the Court was admitted. It was the testi-

mony of Uncle Wong Gong, who was not before the Court, that is inadmissible.

In the *Mar Gong* case, *supra,* this Court accepted as perfectly proper the use of testimony that the witnesses previously gave before a Board of Special Inquiry "to turn up discrepancies in their testimony." And stated: "It is now claimed that when the record of these earlier examinations is laid alongside of the testimony in the court below * * *." Consequently, appellant has tried to bring into the Hearsay Rule that which is not considered hearsay.

Thus, we see that not only was Exhibit "A" admissible but it was equivalent to *affirmative testimony* for the party offering it.

(2) Appellant's statements contain such an inherent improbability as to induce the Court to disregard his evidence. One cannot live for twenty-one years in a village of 40 houses and be absolutely unacquainted with his surroundings and its occupants.

(3) "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth * * * How can we say the judge is wrong? We never saw the witnesses * * * to the sophistication and sagacity of the trial judge the law confides the duty of appraisal." (*Boyd v. Boyd,* 252 N. Y. 422, 429, as adopted by Mr. Justice Jackson in *United States v. Oregon Medical Society,* 343 U. S. 326, 339.)

(4) The granting of a continuance for the purpose of producing so-called "cumulative evidence" was within the discretion of the trial court. Improbability of the appellant's testimony would not be cured by any testimony given by his alleged mother. It was no abuse of discretion by the trial court to deny a continuance that might have gone on for a time of years in view of the waiting list of those seeking to come to the United States from China, for any purpose.

(5) Appellant has stated no law that would justify this Court reversing the lower court upon a question of fact. The trial court, in view of the burden upon the appellant, could require clear and convincing proof. The lower court has found that he does not believe the testimony of the appellant and that there is not sufficient credible evidence to support appellant's claim that he is a United States citizen [T. R. 14].

Wherefore, for the reasons above given, it is respectfully requested that the Judgment of the lower court be affirmed.

Dated: March 1, 1954.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT K. GREAN,
Assistant United States Attorney,

Attorneys for Appellee.

In the United States Court of Appeals for the Ninth Circuit

No. 14081

LAWRENCE E. PARKER, ET AL., APPELLANTS

v.

J. A. LESTER, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEES

WARREN E. BURGER,
Assistant Attorney General,
LLOYD H. BURKE,
United States Attorney,
PAUL A. SWEENEY,
DONALD B. MAC GUINEAS,
Attorneys, Department of Justice,
Attorneys for Appellees.

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In the United States Court of Appeals for the Ninth Circuit

No. 14081

LAWRENCE E. PARKER, ET AL., APPELLANTS

v.

J. A. LESTER, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal by the plaintiffs below from a decree of the District Court granting them partial relief (Tr. 336-40).[1] The decision of the court below (Tr. 276-302) is reported as *Parker* v. *Lester,* 112 F. Supp. 433.

Appellants are merchant seamen who brought this action for injunction and declaratory judgment on behalf of themselves and others of their class to challenge

[1] Appellees also filed a notice of appeal pending decision by the Solicitor General as to whether an appeal should be prosecuted but now acquiesce in the decree and have not pursued their appeal.

the validity and constitutionality of the so-called Magnuson Act (Act of August 9, 1950, 64 Stat. 427, 50 U.S.C. 191) and the executive orders and regulations of the United States Coast Guard issued pursuant thereto.

Appellees, defendants below, are officers of the Coast Guard and of the Army who enforce in the San Francisco area the security clearance program challenged by appellants.[2]

The Magnuson Act. This act, enacted in 1950 during the Korean crisis, authorizes the President, whenever he finds that the security of the United States is endangered by subversive activities (among other things), to institute measures to safeguard vessels and ports of the United States from injury from sabotage or other subversive acts.

The Executive Orders. On October 18, 1950, the President issued Executive Order 10173 (15 F.R. 7005) in which he found that the security of the United States is endangered by subversive activity and prescribed regulations vesting enforcement of the Act in the Coast Guard and providing that seamen should not be employed on American merchant vessels unless they held validated documents, which the Commandant of the Coast Guard was not to issue unless he was satisfied that the character and habits of a seaman authorize the belief that his presence on board ship would not be inimical to the security of the United States.[3]

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[2] The court below held that the action was moot as to the defendant Army officers (Tr. 276-7; 112 F. Supp. at 436) and appellants do not challenge that holding.

[3] As amended by Executive Order 10277 (August 1, 1951, 16 F.R. 7537) and Executive Order 10352 (May 19, 1952, 17 F.R. 4607).

The Coast Guard Regulations and Hearing Procedure. As this Court pointed out in *United States* v. *Gray,* 207 F. 2d 237, the regulations promulgated by the Coast Guard make elaborate provisions for local and national appeal boards to which appeals may be taken from the initial determination of the Commandant by a seaman who has been denied clearance. Clearance is denied where reasonable grounds exist for the belief that the seaman (1) has committed acts of treason, espionage or sabotage; (2) is under the influence of a foreign government; (3) has advocated the overthrow of the Government by force or violence; (4) has intentionally disclosed classified information to unauthorized persons; or (5) is or recently has been a member of or affiliated with an organization designated by the Attorney General as totalitarian, fascist, communist, or subversive (33 C.F.R., § 121.01-13).[4]

A seaman denied clearance is given a written notice of his security denial and may appeal first to a local and then to a national appeal board, each composed of one Coast Guard, one management and one labor member. He may file a written answer and is given advance notice of the time and place of hearing and the names and occupations of the board members (33 C.F.R. § 121.15, 121.17, 121.19, 121.27). The seaman

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[4] All references to 33 C.F.R. are to the 1954 pocket supplement to the 1949 edition.

The seaman initially applies to a local Coast Guard office for security credentials. His application is forwarded to Coast Guard Headquarters in Washington where his name is checked against information in the Coast Guard files, derived chiefly from reports by the FBI and the military intelligence branches. The criteria stated above are applied in making the initial determination by the Commandant as to whether the seaman is granted or denied security clearance (Tr. 398, 400, 402-3, 503).

may challenge any board member (33 C.F.R. § 121.21).

The appeal board has before it the complete record on which the Commandant's initial determination to deny clearance was made (see Tr. 494). The seaman may appear in person and by counsel and may submit testimonial and documentary evidence. The technical rules of evidence are not applicable. The seaman has the option of open or closed hearings. Security information is not disclosed. A transcript is made of the hearing, a copy of which (with any classified information deleted) is given the seaman in the event of an adverse decision (33 C.F.R. § 121.21, 121.23).

The local appeal board sends its recommendation, with any dissent noted, to the Commandant. The complete record is again reviewed and if the initial determination is adhered to, the seaman is notified of his right of further appeal to the national appeal board in Washington. Its procedure is the same as that of the local board (33 C.F.R. § 121.25, 121.27, 121.29).

In all cases the final determination to grant or deny security clearance is made by the Commandant (33 C.F.R. § 121.31).

Appellants challenged below and challenge here the authority and constitutionality of the hearing procedure under the Coast Guard regulations on various grounds: that the appeal board hearings provided seamen are not authorized by the Magnuson Act or the executive orders and regulations promulgated thereunder; that the hearings do not conform to the requirements of the Administrative Procedure Act; and that the hearings deny due process to appellants.

The Decision Below. After a full trial on the merits the Court below held that the Administrative Proce-

dure Act did not apply to these security hearings, in the light of the exception in that act as to the "conduct of military, naval, or foreign affairs functions" (5 U.S.C. 1004); that the Coast Guard regulations are authorized by the Magnuson Act and that the type of hearing provided by the regulations accorded appellants due process of law except in two respects: (1) a seaman is entitled to be given a statement of the basis of the initial determination by the Commandant of the Coast Guard that he was not satisfied that the seaman is not a security risk with such specificity as to afford him reasonable notice and an opportunity to marshal evidence in his behalf; and (2) a seaman who chooses to appeal a denial of security clearance to the appeal boards is entitled to be given on demand the contents, but not the source, of the testimony against him by a bill of particulars and an opportunity to rebut specific allegations of misconduct or acts or associations which the appeal board considers relevant to the determination that he is a security risk (Tr. 290-9; 112 F. Supp. at 441-4).

The Decree. In accordance with this opinion, the court below entered a decree permanently enjoining the Coast Guard officials who administer the security clearance program in San Francisco from giving any effect to a denial of security clearance and from preventing a seaman from being employed on merchant vessels unless the seaman had been given (1) a statement of the basis for the initial determination by the Commandant that such seaman is not entitled to security clearance, "to be worded with such specificity as to afford the seaman reasonable notice of the said basis and an opportunity to marshal evidence in refutation

thereof;'' and (2) upon the seaman's demand, a statement of particulars setting forth the acts, associations or beliefs which formed the basis for the determination that such seaman is a poor security risk, ''provided however, that such bill of particulars need not set forth the source of such data, nor disclose the data with such specificity that the identity of any informers * * * will necessarily be disclosed'' (Tr. 336-9).

This decree further provided that the injunction should apply notwithstanding compliance by the Coast Guard with the requirements for a statement of the basis of initial determination and for a bill of particulars unless such statement and bill of particulars were given ''to all merchant seamen in this jurisdiction'' on the following conditions:

1. As to merchant seamen previously denied security clearance, they must be given such statement of the basis of initial determination and bill of particulars ''within a reasonable time'' after entry of the decree; and

2. As to seamen denied clearance after entry of the decree, they must be given such statements ''within a reasonable time after security clearance has been denied'' (Tr. 339-40).

The decree contained a further proviso that the injunction should not be applicable to seamen who had been denied security clearance ''for a reasonable period of time after the signing of the Decree'' so as to permit the Coast Guard to initiate proceedings complying with the requirements of the decree (Tr. 340).

This Court's decision in United States v. Gray. On September 22, 1953, two months after the entry of the decree below, this Court decided *United States* v. *Gray,*

207 F. 2d 237, involving a similar challenge to the constitutionality of the Coast Guard security clearance procedure. In that opinion this Court expressly agreed with the decision of the court below in the present case and held that the Magnuson Act, the Executive Order, and the Coast Guard regulations issued thereunder were not unconstitutional on their face; that due process did not require that the seaman be given access to the information in the Commandant's file concerning the individual denied clearance or revelation of the names of informants, but that the seaman was entitled to be apprised of the basis for the initial determination with such specificity as to afford him notice and an opportunity to marshal evidence in his behalf; and that at the hearing before the appeal board he was entitled to be informed "of the contents of the showing against him" (207 F. 2d at 241-2).

The Amendment of the Coast Guard Regulations. The Government thereupon acquiesced in this Court's decision in the *Gray* case and did not pursue its appeal from the judgment below. Pursuant to that acquiescence, the Coast Guard on October 27, 1953, amended its regulations under the Magnuson Act to provide that any seaman denied security clearance would be given a written notification containing a statement of the basis for the initial determination "worded with such specificity as to afford such person an opportunity to marshal evidence in refutation thereof, and otherwise in his behalf" and that if a seaman appeals to a local appeal board, the board shall give him "a written statement or bill of particulars setting forth the alleged acts, or associations, or beliefs, or other data which formed the basis for the determination that the appellant is a

poor security risk or is not entitled to security clearance," but that the statement or bill of particulars "shall not be worded with such particularity or specificity as to disclose the source of such information or data, nor the identity of any person or persons who may have furnished such information or data" (18 F. R. 6941-2; 33 C. F. R., § 121.15, 121.21).

As to seamen previously denied security clearance, such as appellants, the revised regulations gave them 60 days from November 3, 1953 (subject to extension by the Commandant for good cause) to file a new appeal under which they would receive the procedural rights prescribed by the revised regulations (18 F. R. 6941).

Two appellants, Payney and Kulper, were granted security clearance before this case was decided below (Tr. 283; 112 F. Supp. at 439). The other four appellants have availed themselves of the new appeal granted them by the revised regulations, and their appeals are now in process (Affidavit of Captain James D. Craik, Appendix, pp. 38-42, below).

Appellants in prosecuting this appeal are thus challenging the validity of the *revised* hearing procedure prescribed by the amended regulations notwithstanding the fact that it complies with the opinion (and decree) below which this Court expressly approved in the *Gray* decision. In effect appellants are thus asking this Court to overrule its decision in the *Gray* case.

Results of the clearance program. In order that the Court may have an up-to-date picture of the operation of the merchant seamen clearance program, we submit in the appendix to this brief (pp. 42-3 below) the affidavit of Captain James D. Craik, who is in charge of the Coast Guard records of this program, which gives

a tabulation of the number of seamen screened, the number granted clearance at various stages of the administrative process, and the number denied clearance as of May 14, 1954. The figures are:

Total Seamen Screened	392,243
Cleared Initially	389,097
Denied Initially	3,146
Appeals by Seamen to Local Appeal Board	1,817
Cleared	989
Denied	668
Appeals to National Appeal Board	412
Cleared	205
Denied	207
Seamen cleared on appeal and then later denied due to further derogatory information	4
Appeal Board recommendations Overruled by Commandant (Seamen):	
(a) Local Appeal Board—Favorable Recommendations	10
(b) Local Appeal Board—Unfavorable Recommendations	2
Total Seamen in Denial Status	1,952
Total Seamen Appeals Pending	160

STATUTE, EXECUTIVE ORDERS, AND REGULATIONS INVOLVED

Appellants' brief sets forth portions of the Magnuson Act (pp. 5-6) and of Executive Order 10173 as amended (p. 7) and certain portions of the Coast Guard regulations, *but not the revisions made to comply with the decree below* (pp. 8-15). The provisions of the revised regulations with respect to the giving of a statement of the basis of the Commandant's initial determi-

nation and a bill of particulars, in the event the seaman appeals, read as follows, with the revisions in italics:

Denial or revocation of clearance indorsement. (1) When it is determined by the Commandant that a person to whom security clearance has been denied or is not eligible therefor within the meaning of § 121.13 (d) (or § 125.29 of this chapter for a person denied access to waterfront facilities or vessels), such person shall be so notified in writing. *This written notification shall contain a statement of the basis for the initial determination that he is not entitled to security clearance or that he is a poor security risk.* (33 C. F. R., § 121.15(e)(1).)

* * * * * * *

The statement of the basis for the action taken under subparagraph (1) or (2) of this paragraph shall be worded with such specificity as to afford such person an opportunity to marshal evidence in refutation thereof, and otherwise in his behalf. This statement shall not be worded with such particularity as to disclose the source of such information or data, nor the identity of any person or persons who may have furnished such information or data, to said person or other persons. (33 C. F. R., § 121.15(e)(3).)

Chairman of the Board; duties and responsibilities. (a) The Chairman of the Board shall keep a list of the names and addresses of the members of the panel and maintain current data with respect to their availability. He shall also make all necessary arrangements incidental to the business of the Board. These arrangements shall include the de-

signation of management and labor panel members to hear each specific appeal, and the designation of alternate panel members when necessary. In carrying out these duties the Chairman of the Board shall:

(1) Accept an appeal from any appellant denied security clearance;

(2) Obtain from the Commandant the complete record in the case;

(3) Furnish the appellant with a written notification stating:

(i) *The basis for the action in the form of a written statement or bill of particulars setting forth the alleged acts, or associations, or beliefs, or other data which formed the basis for the determination that the appellant is a poor security risk or is not entitled to security clearance. This statement or bill of particulars shall not be worded with such particularity or specificity as to disclose the source of such information or data, nor the identity of any person or persons who may have furnished such information or data, to the appellant or to other persons.* (33 C. F. R. § 121.21(a).)

SUMMARY OF ARGUMENT

I. The two appellants who have been given security clearance have no standing to prosecute this action. The remaining four appellants have administrative appeals pending under the revised Coast Guard regulations, adopted to carry out the decree below and to comply with this Court's opinion in *United States* v. *Gray*, 207 F. 2d 237. The rule requiring exhaustion of administrative remedies before resort to the courts is

applicable here where the administrative remedy first became available after disposition of the case by the trial court. The fact that constitutional issues are involved constitutes a reason for requiring appellants to exhaust their administrative remedies, for they may be cleared by that process, in which event the constitutional problems will no longer exist.

II. The screening program is authorized by the Magnuson Act. This is shown by the Act's legislative history, as Senator Magnuson, the sponsor of the bill, stated that it would authorize the same kind of security measures as were invoked in World War II. During that war the Coast Guard had a similar screening program which summarily denied access to vessels to persons deemed to constitute a menace to the national security.

In any event the administrative construction of the Magnuson Act as authorizing this screening program has plainly been ratified by Congress. Each year since the passage of the Act the screening program has been brought to the attention of Congress and appropriations have been made to the Coast Guard to carry out the program.

III. The provisions of the Administrative Procedure Act as to the conduct of agency hearings and the making of agency adjudications are inapplicable to the screening program for two independent reasons:

(1) These requirements of the Administrative Procedure Act are applicable only where the statute involved requires the determination to be made "on the record" and "after opportunity for an agency hearing." The Magnuson Act has no such requirement. Both the legislative history of the Magnuson Act and

the Congressional ratification of the screening program indicate that the Commandant's determinations were to be made in part on the basis of confidential information from intelligence agencies and hence was not limited to a determination "on the record" in the Administrative Procedure Act sense. Likewise the legislative history of the Act and the Congressional ratification of the screening program indicate that Congress understands that the Commandant's initial determination as to security risk is to be made before, not "after opportunity for an agency hearing."

(2) These requirements of the Administrative Procedure Act are also inapplicable because the Commandant's determination of security risk involves the conduct of military and naval affairs, a field expressly excepted from these requirements of the Administrative Procedure Act. In the light of the fact that the Magnuson Act was enacted as a result of the Korean crisis and was designed to protect vessels carrying military supplies from sabotage, the close relationship of this security program to military affairs is obvious.

IV. The screening program as revised to comply with the decree below and this Court's decision in the *Gray* case does not violate the due process clause. This has in effect been already held by this court in its *Gray* decision.

(1) The fact that the Commandant's initial determination of security risk is made in advance of the administrative hearing does not violate due process. Since the seamen are given an adequate administrative hearing after the Commandant's initial determination, the requirements of due process are met.

(2) Nor is the due process clause violated by the fact that the names of those who give confidential information to the Coast Guard about seamen are not disclosed in the administrative process. To make such a disclosure would nullify the security program, as this Court recognized in its *Gray* decision.

(3) Likewise appellants have no constitutional right to confront and cross-examine the persons who have given the Coast Guard confidential information about them. The constitutional right of confrontation and cross examination of witnesses is applicable only to criminal proceedings, not to an administrative proceeding such as this.

ARGUMENT

I

Appellants have failed to exhaust their administrative remedy

As stated above (p. 7), the Coast Guard regulations as revised shortly after the entry of the decree in this case provide appellants with the administrative remedy of a new appeal in which they will receive a specific statement of the basis of the Commandant's initial determination to deny them security clearance and a bill of particulars setting forth the acts, associations or beliefs which formed the basis for that determination. All of the appellants who have been denied clearance are presently availing themselves of this new administrative remedy and their appeals are in process (see p. 8, above).[5]

[5] Appellants Payney and Kulper, having been granted clearance, obviously have no standing to prosecute this action. No justiciable controversy exists between them and appellees. *Doremus* v. *Board of Education,* 342 U. S. 429; *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board,* 340 U. S. 416; *Eccles* v. *Peoples Bank,* 333 U. S. 426, 431-4.

It may be that the outcome of these new appeals will be a determination by the Commandant that these appellants are not security risks. If so, the grievance of which they complain here will be completely remedied by the administrative process and there will be no occasion for their invoking judicial relief. In these circumstances this Court will not pass on appellants' contentions, at least until the pending administrative appeals are concluded.

As stated in *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, 767:

> The doctrine, wherever applicable, does not require merely the initiation of prescribed administrative procedures. *It is one of exhausting them, that is, of pursuing them to their appropriate conclusion and correlatively, of awaiting their final outcome before seeking judical intervention.*
>
> The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for *or perchance to make unnecessary later judicial proceedings.* [Italics supplied.]

See also *Macauley* v. *Waterman Steamship Corp.,* 327 U.S. 540; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41; *Public Service Commission of Utah* v. *Wycoff Company,* 344 U.S. 237, 240-1, 246; *Federal Power Commission* v. *Arkansas Power & Light Co.,* 330 U.S. 802; *Securities and Exchange Commission* v. *Otis & Co.,* 338 U.S. 843; *Public Utilities Commission of California* v. *United Air Lines,* 346 U.S. 402.

The fact that appellants seek to raise constitutional issues is no ground for relaxing the requirement that they exhaust their administrative remedy before seeking judicial relief. Indeed, "the very fact that constitutional issues are put forward constitutes a strong reason for not allowing this suit either to anticipate or to take the place of [the administrative determination]. When that has been done, it is possible that nothing will be left of appellant's claim, asserted both in that proceeding and in this cause, concerning which it will have basis for complaint." *Aircraft & Diesel* case, *supra,* at page 772. In *Allen* v. *Grand Central Aircraft Co.,* — U.S. — (No. 450, Oct. term, 1953, decided May 24, 1954), the Supreme Court refused to rule on constitutional issues where the plaintiff had not exhausted its administrative remedy. See also *Franklin* v. *Jonco Aircraft Corp.,* 346 U.S. 868, in which the Supreme Court reversed, because of plaintiff's failure to exhaust its administrative remedy, an injunctive decree entered by a 3-judge district court in *Jonco Aircraft Corp.* v. *Franklin,* 114 F. Supp. 392 (N.D. Tex.), holding that the statute challenged in the action was unconstitutional.

The fact that the revised Coast Guard regulations did not become effective until after the entry of the decree below does not make the requirement of exhaustion of administrative remedies any less applicable. In *Hunter* v. *Beets,* 180 F. 2d 101 (C.A. 10), cert. den. 339 U.S. 963, the Court of Appeals reversed a judgment granting a writ of habeas corpus, on the ground of the petitioner's failure to exhaust an administrative remedy which first became available after judgment had been entered by the District Court. See also *McMahan*

v. *Hunter,* 179 F. 2d 661 (C.A. 10), to the same effect.

In *Gusik* v. *Schilder,* 340 U.S. 128, 133-4, the Supreme Court indicated that in such circumstances a court of appeals should hold the case under advisement until the outcome of the administrative proceedings. See also *Whelchel* v. *McDonald,* 340 U.S. 122, affirming *Welchel* v. *McDonald,* 176 F. 2d 260, 178 F. 2d 760 (C.A. 5), where the court of appeals withheld decision pending disposition of the administrative review.

The court below indicated that the doctrine of exhaustion of administrative remedies would not be applied where the seamen had gone through the proceedings before the local appeal board and were remitted to the remedy of an appeal before the national board in Washington. The court below stated that it would be unduly onerous to require an unemployed seaman to travel from San Francisco to Washington for a hearing "conducted pursuant to the same statute and regulations but before a board differently constituted" (Tr. 288-90; 112 F. Supp. 440-1). And see this Court's opinion in the *Gray* case, 207 F. 2d at 240, footnote 4. These considerations are not applicable to appellants' pending administrative appeals. That remedy cannot be so burdensome, for all of the appellants not already cleared are now resorting to it. Furthermore these administrative appeals are being conducted under the revised regulations, which give appellants new procedure deemed sufficient by the court below and by this Court in its *Gray* decision to meet the requirements of due process. Hence, there is no basis in the present stage of this case for finding any exception to the rule requiring the exhaustion of administrative remedies.

II

The screening procedure prescribed by the Coast Guard regulations is authorized by the Magnuson Act

The Court below held that the Coast Guard regulations are "contemplated and authorized by the statute" (Tr. 292-3; 112 F. Supp. at 442). This Court apparently agrees with that conclusion, for presumably it would not have reached in its *Gray* decision the issue as to the constitutionality of the administrative procedure if it had considered that that case could have been disposed of on the non-constitutional ground that the screening was not authorized by the Magnuson Act. *Rescue Army* v. *Municipal Court,* 331 U.S. 549, 568-85; *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450, 461. In any event appellants' contention is without merit.

1. *The legislative history of the Magnuson Act shows that the merchant seamen screening program was contemplated.* The report of the Senate Committee on Interstate and Foreign Commerce on S. 3859 (81st Cong., 2d sess.) describes the purpose of the bill in general terms as giving "the President the power to safeguard against destruction, loss, or injury from sabotage or other subversive acts to vessels, harbors, ports, and other water-front facilities" (S. Rep. 2118, 81st Cong., 2d sess.). The report of the House Committee on the Judiciary on H. R. 9215 (81st Cong., 2d sess.), similarly states in general terms that "the bill enables the President to take such protective steps as seem necessary in his opinion. * * * The bill extends its protection to ports and water-front facilities under the jurisdiction of the United States which are subjected

to hazard by reason of sabotage, subversion, or accidents" (H. Rep. 2740, 81st Cong., 2d sess.).[6]

The statements by Senator Magnuson, the sponsor of the bill, on the floor of the Senate plainly indicate that one of its purposes was to remove the danger of sabotage by subversive individuals:

> Furthermore, the bill will allow the President to invoke security measures on the waterfronts—that is to say, around the docks. In my opinion, the bill will have the dual effect of helping clean out whatever subversive influences may exist around the waterfronts and of protecting the country from sneak attacks of the sort I have mentioned. Some of the last strongholds of the Communists in this country exist in some of the waterfront unions, despite the efforts of patriotic maritime labor leaders to clean out some of those unions.
>
> * * * * *
>
> This measure will give the President the authority to invoke the same kind of security measures which were invoked in World War I and in World War II. (96 Cong. Rec. 10794-5.)
>
> It also has this purpose, which I think is a good one: As I have said before, the last stronghold of subversive activity in this country, in my opinion, or at least the last concentrated stronghold, has been around our water fronts. * * * This would give authority to the President to instruct the FBI, in cooperation with the Coast Guard, the

[6] The House passed its bill but immediately thereafter vacated its proceedings, laid the bill on the table and passed the Senate bill (96 Cong. Rec. 11221).

> Navy, or any other appropriate governmental agency, to go to our water fronts and pick out people who might be subversives or security risks to this country. I think it goes a long way toward taking care of the domestic situation, as related to this subject, particularly in view of the large amount of talk we have had in the Senate within the past few days about Communists. * * *
> (96 Cong. Rec. 11321.)

As the court below pointed out (Tr. 292, 112 F. Supp. at 442), the significance of Senator Magnuson's statement that the bill would authorize the President to invoke the same kind of security measures as were invoked in World Wars I and II is that during the second world war the Coast Guard summarily denied access to vessels and waterfront facilities to any person whose presence would "constitute a menace to the national security or to the safety of life or property" (Directive of the Commandant of the Coast Guard issued July 20, 1942, set out in the appendix, p. 44 below).

Accordingly, the legislative history of the Magnuson Act shows that it was intended to authorize a procedure for screening security risks in the merchant marine to avoid dangers of sabotage, espionage, etc.

2. *The security screening procedure under the Coast Guard regulations has been ratified by Congress.* Even if there were doubt as to whether the language and legislative history of the Magnuson Act demonstrate that the security risk screening procedure was authorized by that Act, any such doubt would be dispelled by the fact that Congress has plainly ratified that procedure. Each year since the enactment of the Magnuson Act Coast

Guard officials have testified before subcommittees of the appropriations committees about this screening procedure as one of the activities covered by the annual appropriation of funds for operating expenses of the Coast Guard.[7]

As an example, at the hearings before a subcommittee of the House Committee on Appropriations on the Treasury-Post Office Departments Appropriations for 1952, the Commandant of the Coast Guard testified:

> The port security program, initiated in October 1950, provided for an increase of 500 officers, 70 warrant officers, and 4,202 enlisted men. The estimate for 1952 contemplates carrying this program on a full year basis. The duties imposed on the Coast Guard under the above may be grouped into four operations, as follows:
>
> * * * * *
>
> (3) Prevention of subversives from sailing on merchant vessels of the United States. This will be accomplished by denying employment on American merchant vessels to merchant seamen who do not hold specially validated documents. These

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[7] All of the following references are to hearings before a subcommittee of the House Committee on Appropriations or of the Senate Committee on Appropriations, as indicated:

Second Supplemental Appropriation Bill for 1951, House Hearings, pp. 135-7, 142, 144;

Treasury-Post Office Departments Appropriations for 1952, House Hearings, pp. 139-40, Senate Hearings, pp. 34, 143, 172;

Treasury-Post Office Departments Appropriations for 1953, House Hearings, p. 211, Senate Hearings, p. 75;

Treasury-Post Office Departments Appropriations for 1954, House Hearings, pp. 431-4, Senate Hearings, p. 269;

Treasury-Post Office Departments Appropriations for 1955, House Hearings, pp. 448, 471-3, 503-5, Senate Hearings, pp. 341-2.

special documents will be issued to seamen only, after a name clearance check with intelligence agencies. (Hearings, pp. 139-40).

In addition, the Annual Report of the Secretary of the Treasury for each year since the Magnuson Act has described the screening program.[8] Thus the 1952 Annual Report states (page 177):

> The port security program carrying out Executive Order 10173, which was begun in 1951 to provide for the safeguarding of vessels, harbors, ports, and waterfront facilities in the United States, was continued in 1952. The purpose of this program is the protection of waterfront facilities and of vessels in port. Under this program, measures to prevent sabotage include the security screening of seamen, longshoremen, pilots, and waterfront workers, and others required to have access to restricted waterfront facilities and vessels in port.
>
> Persons to be employed aboard merchant vessels are checked to determine whether they were security risks, and during the year 170,328 merchant mariners' documents bearing evidence of security clearance were issued to individuals. A total of 775 security appeal hearings was granted to those who were classed as poor security risks.
>
> In the other category of longshoremen, warehousemen, pilots, and waterfront workers, 196,951 persons were screened and 188,301 port security cards were issued, while 827 hearings were granted upon appeal by persons who had been found to be poor security risks.

[8] 1951 Report, p. 135; 1952 Report, p. 177; 1953 Report, p. 148.

With this knowledge of the Coast Guard screening procedure before it, Congress has appropriated several million dollars each year to finance this program as part of the operating expenses of the Coast Guard.[9]

This repeated appropriation of funds to carry out the screening program is a plain case of legislative ratification of the administrative interpretation of the Magnuson Act as authorizing that program. *Ludecke* v. *Watkins,* 335 U. S. 160, 173 n. 19; *Fleming* v. *Mohawk Co.,* 331 U. S. 111, 116; *Brooks* v. *Dewar,* 313 U. S. 354, 361; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147.

Appellants' characterization of the screening procedure as an unauthorized "thought-control program" (Brief, p. 32) is mere invective. A seaman's views as to the righteousness of the communist cause, his associations with the Communist Party or with communist-front organizations are scarcely wholly irrelevant to the question of whether he is a security risk. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 391 et seq.; *Adler* v. *Board of Education,* 342 U. S. 485; *Carlson* v. *Landon,* 342 U. S. 524, 535-6, 541; *Harisiades* v. *Shaughnessy,* 342 U. S. 581, 590-2; *Garner* v. *Board of Public Works of Los Angeles,* 341 U. S. 716, 720; *Dennis* v. *United States,* 341 U. S. 494, 497-8, 501-11; *Orloff* v.

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[9] Second Supplemental Appropriation Act, 1951 (64 Stat. 1223, 1227);

Treasury and Post Office Departments Appropriation Act, 1952 (65 Stat. 182, 185);

Treasury and Post Office Departments Appropriation Act, 1953 (66 Stat. 289, 291);

Treasury and Post Office Departments Appropriation Act, 1954 (67 Stat. 67, 69);

Treasury and Post Office Departments Appropriation Act, 1955 (68 Stat. 144, 146).

Willoughby, 345 U. S. 83, 89-92; *Galvan* v. *Press,* — U. S. — (No. 407, Oct. Term, 1953, decided May 24, 1953).

There is no showing on this record that the screening procedure is ever applied to deny clearance to seamen solely because of their innocent participation in communist or communist-front organizations or activities. Indeed the record indicates the contrary (Tr. 535, 537-8, 561-2). Hence *Wieman* v. *Updegraff,* 344 U. S. 183, has no application here.

Accordingly, the seamen screening procedure prescribed by the Coast Guard Regulations is authorized by the Magnuson Act.

III

The adjudication and hearings provisions of the Administrative Procedure Act are not applicable to the appeals hearings under the screening program

The court below correctly held that the provisions of the Administrative Procedure Act as to the manner of conducting agency hearings and making adjudications (Act of June 11, 1946, 60 Stat. 237, 239, 241, 242, 5 U. S. C. 1004, 1006, 1007) are not applicable to the hearings given seamen before the Coast Guard appeal boards (Tr. 290-2; 112 F. Supp. at 441-2).[10]

The Administrative Procedure Act provides that its procedural requirements as to the conduct of agency hearings and the making of agency adjudications shall be applicable:

> In every case of adjudication required by statute to be determined on the record after opportunity

[10] This Court's decision in the *Gray* case made no reference to the applicability of the Administrative Procedure Act.

> for an agency hearing, except to the extent that there is involved * * * (4) the conduct of military, naval, or foreign affairs functions * * *. (5 U. S. C. 1004.)

As the court below pointed out (Tr. 291-2; 112 F. Supp. at 441-2), there are two independent grounds why the agency hearing requirements of the Administrative Procedure Act have no application to the screening program under the Coast Guard regulations: (1) the Commandant's determination that a seaman should be denied clearance is not "required by statute to be determined on the record after opportunity for an agency hearing"; and (2) this screening program involves "the conduct of military, naval, or foreign affairs functions" (5 U. S. C. 1004).

1. *The hearing requirements of the Administrative Procedure Act are inapplicable because the Commandant's determination as to whether a seaman is a security risk is not required by the Magnuson Act "to be determined on the record after opportunity for an agency hearing."* There is nothing in the text of the Magnuson Act requiring that the Commandant's determinations either be made "on the record" or "after opportunity for an agency hearing." The Act says nothing as to either record or hearing. Under the Coast Guard regulations the Commandant's initial determination as to a seaman's security clearance is made without any "record" at all (in the Administrative Procedure Act sense), for that determination is made on the basis of material in the Coast Guard files consisting largely of reports of Government intelligence agencies. As we have shown at pages 20-3, above, Congress has plainly ratified the Coast Guard interpretation that the Magnu-

son Act authorizes the Commandant's initial determination to be made not on the basis of a formal "record" and in advance of any hearing at all. Likewise the Commandant's determination of a seaman's appeal from an initial denial of security clearance is not limited to the evidence adduced at the hearing before the Appeal Board. Here also the Commandant considers confidential information from intelligence agencies.

As the court below pointed out (Tr. 292, 112 F. Supp. at 442) the legislative history of the Magnuson Act also shows that Congress did not intend to have the screening proceedings conducted pursuant to the Administrative Procedure Act, for Senator Magnuson stated that his bill would authorize the same kind of security measures as were resorted to in World War II, and those measures did not give the seaman any right to a hearing at all and did not require that the determination be made "on the record" in the Administrative Procedure Act sense (see pp. 19-20 above).

Accordingly, since the Magnuson Act does not require the Commandant's determination to be made "on the record after opportunity for an agency hearing," the requirements of the Administrative Procedure Act as to agency hearings and adjudications are inapplicable. *Herman* v. *Dulles,* 205 F. 2d 715, 717 (C. A. D. C.). [Administrative Procedure Act inapplicable to disciplinary proceedings against counsel practicing before agency]; *Sakis* v. *United States,* 103 F. Supp. 292, 309 (D. D. C.) [Act inapplicable to determination by Interstate Commerce Commission as to modification of railroad's financial structure]. See also *Fahey* v. *O'Melveny & Myers,* 200 F. 2d 420, 479 (C. A. 9) [Act inapplicable to orders of Home Loan Bank Board]; *Ken-*

nedy Name Plate Co. v. *Commissioner of Internal Revenue,* 170 F. 2d 196, 198 (C. A. 9), and *Cohen* v. *Commissioner of Internal Revenue,* 176 F. 2d 394, 396 (C. A. 10) [Act inapplicable to Tax Court proceedings]; *American Trucking Associations* v. *United States,* 344 U. S. 298, 318-20, and *Willapoint Oysters, Inc.* v. *Ewing,* 174 F. 2d 676, 692 (C. A. 9) [Act inapplicable to agency rule-making]; *Hiatt* v. *Compagna,* 178 F. 2d 42, 46 (C. A. 5) [Act inapplicable to hearings before federal Parole Board]; *Lesser* v. *Humphrey,* 89 F. Supp. 474 (M. D. Pa.) [Act inapplicable to proceedings before federal Good Time Board].

The legislative history of the Administrative Procedure Act also shows that the agency hearing and adjudication provisions of that Act are not applicable to adjudications under a statute such as the Magnuson Act which does not itself require the agency action to be taken "on the record after opportunity for an agency hearing." As stated in the Attorney General's Manual on the Administrative Procedure Act (1947), page 41:

> It will be noted that the formal procedure requirements of the Act are invoked only where agency action "on the record after opportunity for an agency hearing" is required by some other *statute.* The legislative history makes clear that the word "statute" was used deliberately so as to make sections 5, 7 and 8 applicable only where the Congress has otherwise *specifically* required a hearing to be held. Senate Hearings (1941), pp. 453, 577; Senate Comparative Print of June 1945, p. 7 (Sen. Doc. p. 22); House Hearings (1945), p. 33 (Sen. Doc. p. 79); Sen. Rep. p. 40 (Sen. Doc. p. 226); 92 Cong. Rec. 5651 (Sen. Doc. p. 359). Mere

> statutory authorization to hold hearings (e. g., "such hearings as may be deemed necessary") does not constitute such a requirement. In cases where a hearing is held, although not required by statute, but as a matter of due process or agency policy or practice, sections 5, 7 and 8 do not apply. Senate Hearings (1941), p. 1456.[11]

As the court below stated (Tr. 291-2; 112 F. Supp. at 442), in *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, relied on by appellants, these provisions of the Administrative Procedure Act were held applicable to deportation hearings of the Immigration Service merely because "the requirement of a formal hearing had been previously read into the deportation statute by the Supreme Court." That is not true of the Magnuson Act. In any event the force of the *Wong Yang Sung* decision has been minimized by the action of Congress in 1950 in providing that the hearing requirements of the Administrative Procedure Act should not be applicable to deportation proceedings [12] and in 1952 in providing a "sole and exclusive" procedure for the conduct of such hearings. [13]

2. *The hearing requirements of the Administrative Procedure Act are inapplicable because the Commandant's determination involved "the conduct of military,*

[11] The legislative history of the Administrative Procedure Act is compiled in Senate Document 248, 79th Congress, 2d Session, to which the "Sen. Doc." citations in the above quotation refer.

[12] Supplemental Appropriation Act, 1951 (64 Stat. 1044, 1048, formerly 8 U.S.C. 155a). See *Barber* v. *Yanish,* 196 F. 2d 53 (C.A. 9); *Belizaro* v. *Zimmerman,* 200 F. 2d 282 (C.A. 3); *United States* v. *Spector,* 343 U. S. 169, 178, footnote 6 (Jackson, J., dissenting).

[13] Section 242 (b) of the Immigration and Naturalization Act of 1952 (Act of June 27, 1952, 66 Stat. 163, 209-10, 8 U.S.C. 1252 (b)). See *Marcello* v. *Ahrens,* — F. 2d. — (C.A. 5), decided May 6, 1954 (22 L W 2541).

naval, or foreign affairs functions." The court below further ruled that the agency hearing and adjudication provisions of the Administrative Procedure Act are not applicable to the Commandant's determinations because, as is indicated by the language of Executive Order 10173 issued under the Magnuson Act, the President, in authorizing the Coast Guard to establish this screening procedure "was operating in the area of military and naval affairs" (Tr. 291, 112 F. Supp. at 441). When it is considered that the Magnuson Act was enacted as a result of the Korean crisis, and was designed to protect vessels carrying military supplies from sabotage, this conclusion seems plainly correct.

Thus the Attorney General's Manual on the Administrative Procedure Act (p. 26) states with reference to the comparable exception contained in Section 4 of the Act (5 U.S.C. 1003):

> * * * The exemption for military and naval functions is not limited to activities of the War and Navy Departments but covers all military and naval functions exercised by any agency. Thus, *the exemption applies to the defense functions of the Coast Guard* and to the function of the Federal Power Commission under section 202 (c) of the Federal Power Act (19 U.S.C. 824a(c)). Sen. Rep. p. 39 (Sen. Doc. p. 225); Senate Hearings (1941) p. 502. [Italics supplied].

As to the military and naval affairs exemption contained in Section 5 of the Act (5 U.S.C. 1004), the one directly involved here, the Attorney General's Manual states (p. 45):

> * * * Both Committee reports state that the section "exempts military, naval, and foreign af-

fairs functions for the same reasons that they are exempted from section 4; and, in any event, rarely if ever do statutes require such functions to be exercised upon hearing." Sen. Rep. p. 16; H. R. Rep. p. 27 (Sen. Doc. pp. 202, 261). Thus, the exercise of adjudicatory functions by the War and Navy Departments or by any other agency is exempt to the extent that the conduct of military or naval affairs is involved Senate Hearings (1941) pp. 502-3. * * * [14]

Since the *Wong Yang Sung* decision, *supra,* did not pass on the scope of the military and naval affairs exception to the agency hearings and adjudication provisions of the Administrative Procedure Act, that decision has no application to this point.

Accordingly, the court below correctly held that the agency hearing and adjudication provisions of the Administrative Procedure Act have no application to the screening program under the Magnuson Act.

IV

The screening procedure provided by the decree below and the revised regulations of the Coast Guard do not deny seamen due process of law.

Appellants argue that seamen are denied due process of law even under the revised procedure prescribed by the decree below, which has been put into effect by the revised Coast Guard regulations of October 27, 1953.

---

[14] The report of the Senate Committee on the Judiciary on the bill which became the Administrative Procedure Act contains a letter from the Attorney General to the Chairman of the Committee commenting on the bill, which, states: "The term 'naval' in the first exception clause is intended to include the defense functions of the Coast Guard * * *" (S. Rep. 752, 79th Cong., 1st sess., p. 38; S. Doc. 248, 79th Cong., 2d sess., p. 225).

In making this argument, appellants studiedly ignore the fact that this Court in its *Gray* decision has already held that the screening procedure, as modified in the respects provided by the decree below, meets the requirements of the due process clause. We assume that this Court will adhere to its ruling in the *Gray* case and hence do not repeat here the detailed argument on the due process issue which was made in the Government's brief in the *Gray* case (Appeals Nos. 13499, 13500, 13501).

1. *Appellants are not denied due process by the fact that the Commandant's initial determination as to whether a seaman is a security risk is made prior to the administrative appeal hearing.* As the court below said: "Due process does not require that a hearing be granted at the initial stage of an administrative proceeding. In fact, public necessity of a much less pressing order than the prevention of espionage and sabotage has often been held to justify administrative orders or other action followed subsequently by a hearing [citing cases]" (Tr. 297-8, 112 F. Supp. at 444).

Since this same issue was involved in the *Gray* case, this Court presumably included the above-quoted ruling of the court below in its statement in the *Gray* case that "We are in general agreement with what Judge Murphy had to say on the subject [due process] in his opinion in Parker v. Lester, supra" (207 F. 2d at 241).

In any event the principle that due process requirements are met by giving an administrative hearing after administrative action is taken is firmly established. *Fahey* v. *Mallonee,* 332 U.S. 245, 253; *Inland Empire District Council* v. *Millis,* 325 U.S. 697, 710; *Yakus* v. *United States,* 321 U.S. 414, 436, 442-3; *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, 598.

The Magnuson Act was enacted to deal with the acute security situation brought about by the Korean crisis. To have required advance hearings before several hundred thousand merchant seamen could be cleared and permitted to sail would have tied up the merchant marine for a substantial time when it was most urgently needed. "National security might not be able to afford the luxuries of litigation and the long delays which preliminary hearings traditionally have entailed." *Bowles* v. *Willingham,* 321 U.S. 503, 521.

Appellants' argument (Brief, p. 43) that the screening program has no genuine relationship to the prevention of espionage and sabotage has been disposed of at page 23, above. Appellants' statement (Brief, p. 43) that there is no denial that appellants would not engage in sabotage is incorrect. The complaint alleges that appellants have never committed espionage or sabotage, etc. (Tr. 34), but the answer denies these allegations for lack of knowledge or information sufficient to form a belief (Tr. 108). And appellants offered not one word of proof to support their allegations of innocence.

Furthermore the record shows that acts of sabotage on merchant vessels have occurred (Tr. 420-2). The Coast Guard has information that all four appellants who have not been cleared are either Communist Party members, or have engaged in activities to advance the interests of the Communist Party, such as distributing party literature, soliciting new party members, etc. (Tr. 103-8).

Accordingly, appellants' contention that the failure to grant them a hearing prior to the Commandant's initial determination denies them due process is without merit.

2. *Appellants are not denied due process by the fact that they are not given the source of the information against them.* The court below held that due process requires that a seaman be given reasonable notice of the basis of the Commandant's initial determination that he is a security risk and a bill of particulars giving him the contents of the testimony against him so that he will have an opportunity to rebut specific allegations of misconduct or other acts and associations which the Board considers probative, but that he is not entitled to the source of the information; i.e., the names of informers (Tr. 297-9, 112 F. Supp. at 443-4). Accordingly, the decree below specifically provides that the bill of particulars "need not set forth the source of such data, nor disclose the data with such specificity that the identity of any informers who have supplied such allegations or data will necessarily be disclosed * * *" (Tr. 339).

In its *Gray* decision this Court specifically approved this ruling by the court below in the present case, saying:

> * * * More particularly are we in accord with his [Judge Murphy's] conclusion that due process in the context of the screen program is properly definable in terms of the maximum procedural safeguards which can be afforded the individual without jeopardizing the national security.
>
> Permitting access to the material in the dossier of the Commandant concerning the individual denied clearance, or revelation of the names of the informants would very likely tend to dry up the sources of information. * * *
>
> (207 F. 2d at 241.)

Appellants ignore this Court's ruling on this specific point in the *Gray* case and assert that they have a constitutional right to a disclosure of the complete confidential information in the Coast Guard files.

The record here establishes the correctness of this Court's view in the *Gray* case that a requirement of disclosure of the names of informers would nullify this security program (Tr. 567-8). Under such circumstances due process does not require the disclosure of such information. *United States* v. *Nugent*, 346 U.S. 1. See also *Elder* v. *United States,* 202 F. 2d 465, 468 (C.A. 9); *Bailey* v. *Richardson,* 182 F. 2d 46, 52, 57-8 (C.A. D.C.), affirmed by an equally divided court, 341 U.S. 918; *Kutcher* v. *Gray,* 199 F. 2d 783, 789 (C.A. D.C.); *Chicago & Southern Air Lines* v. *Waterman Corp.,* 333 U.S. 103, 111; *Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294.

The weakness of appellants' argument is demonstrated by the authorities upon which they rely. They quote from the dissenting opinion in *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, and concede that *United States ex rel. Accardi,* 347 U.S. 260, "went off on another point." The only other case they cite, *United States* v. *Edmiston,* 118 F. Supp. 238 (D. Neb.), was a criminal prosecution, as to which the Sixth Amendment imposes requirements not present here. see page 36, below.

Appellant's brief (page 44, footnote 14, and appendices) gives the impression that even under the revised Coast Guard regulations a seaman is not given a specific statement of the contents of the information against him. Appellants fail to inform the Court that upon protest by counsel as to the insufficiency of the

bill of particulars given appellant Parker counsel was informed by the Chairman of the local Appeal Board that his request for additional particulars was being referred to the Commandant, where it is now being processed (appendix, pages 48-9, below).

Accordingly, there is no merit in appellants' contention that the due process clause requires that seamen be given the names of those who have furnished information about them.

3. *Appellants have no constitutional right to confrontation and cross examination of witnesses against them.* Appellants' contention that they are entitled to confront and cross examine those who have given information against them is very closely related to the point just discussed; i.e., that they are not entitled to be given the source of the information against them.

The court below correctly ruled:

> In this context, then, I define due process in terms of the maximum procedural safeguards which can be afforded petitioners without jeopardizing the security program. At the outset, it must be remarked that opportunity for confrontation and cross-examination of adverse witnesses cannot be afforded a petitioner in these situations without destroying the security program. The Federal Bureau of Investigation has uniformly insisted that practically none of the evidential sources available will continue to be available to it if proper secrecy and confidence cannot at all times be maintained with respect to the original source of information. In view of the fact that Constitutional guarantees of confrontation and cross-examination are in terms applicable only to criminal trials, Joint

> Anti-Fascist Refugee Committee v. McGrath, 1951, 341 U. S. 123, 180, 70 S. Ct. 624, 95 L. Ed. 817, I conclude that in this instance, considerations in favor of protecting the investigatory tasks of governmental agencies outweigh the disadvantage flowing to the individual petitioners. (Tr. 297; 112 F. Supp. at 443-4.)

In its *Gray* decision this Court expressed approval of this ruling by the court below (207 F. 2d at 241), but appellants in their brief ignore that fact.

The constitutional right to confrontation and cross examination of witnesses is applicable only to criminal proceedings, not to an administrative proceeding such as is here involved. Sixth Amendment; *Bhagat Singh* v. *McGrath,* 104 F. 2d 122 (C.A. 9); *Bailey* v. *Richardson, supra.*

Appellants are unable to cite a single case holding that the right to confrontation and cross examination of witnesses is applicable to a proceeding of this sort. Their authorities consist merely of a general statement by Wigmore as to the value of cross examination, the dissenting opinion in *United States* v. *Nugent,* 346 U.S. 1, and a press report of a recent statement by Senator McCarthy.

Accordingly, appellants have no constitutional right to confront and cross examine the persons who have given the Coast Guard information about them.

CONCLUSION

Appellants have failed to exhaust the new administrative remedy given them by the revised Coast Guard regulations. The Coast Guard screening procedure is authorized by the Magnuson Act. The Administrative

Procedure Act has no application to the appeals hearings under the screening program. Finally, the screening procedure as revised by the Coast Guard to comply with the decree below and this Court's opinion in *United States* v. *Gray* does not deny appellants due process of law.

The judgment below should be affirmed.

Respectfully submitted,

WARREN E. BURGER,
Assistant Attorney General.
LLOYD H. BURKE,
United States Attorney.
PAUL A. SWEENEY,
Attorney, Department of Justice.
DONALD B. MACGUINEAS,
Attorney, Department of Justice,
Attorneys for Appellees.

APPENDIX

AFFIDAVIT
of
CAPTAIN JAMES D. CRAIK, U. S. C. G.

DISTRICT OF COLUMBIA, ss.

Captain James D. Craik, United States Coast Guard, being first duly sworn on oath, deposes and says that he is Chief, Merchant Vessel Personnel Division, Office of Merchant Marine Safety, United States Coast Guard Headquarters, Washington, District of Columbia, and in such capacity is custodian of the official records of the United States Coast Guard relating to regulations for Security Check and Clearance of Merchant Marine Personnel (33 CFR 121) under the Magnuson Act; that he has examined such records, including those of Lawrence Everett Parker, Fred Harry Kulper, Theodore William Rolfs, Claude F. Payney, Peter Mendelsohn, and Harold Ray Fontaine, plaintiffs in the suit of Parker v. Lester, No. 30484 in the District Court for the Northern District of California, and found:

(1) That Lawrence E. Parker was screened off the SS PRESIDENT CLEVELAND on 1 February 1951; that the said Parker filed an appeal on 5 February 1951; that an Interim Local Appeal Board heard the appeal on 30 March 1951; that the said Parker was notified by the Commandant of the Coast Guard by letter dated 16 May 1951, that his appeal had been rejected; that by letter dated 11 June 1951, signed by his Attorney, Richard Gladstein, Parker specifically requested that a hearing before the National Appeal Board not be scheduled; that in effect no appeal was sought from 11 June 1951 until 15 December 1953; that during the aforementioned

interim further appeals were provided for by the President's Executive Order No. 10173, as amended by Executive Order No. 10277; that on 15 December 1953, the said Parker requested an appeal hearing and that he be furnished with a Bill of Particulars in accordance with the provisions of 33 CFR 121 and 125, as amended by 18 Federal Register 6941-6942; that pursuant to the said request the said Parker on 11 February 1954 was furnished with the requested Bill of Particulars and was advised that his appeal hearing was scheduled before a Tripartite Local Appeal Board on 6 April 1954; that by letter dated 16 March 1954 the said Parker, through his attorney, requested postponement of the scheduled appeal hearing and requested that additional particulars and clarification of the Bill of Particulars be furnished him; that the request for the postponement of the scheduled appeal hearing was granted; that the request for additional particulars and clarification of the Bill of Particulars is now being processed; that such processing involves checking back with the agencies that originally furnished the derogatory information; that Parker's appeal hearing is now pending; that no date for such hearing has been set;

(2) That Fred Harry Kulper, was screened off the SS INDIAN HEAD as a security risk on 12 April 1951; that the said Kulper filed an appeal on 13 April 1951; that this appeal came on to be heard by a Tripartite Local Appeal Board on 6 September 1951; that the said Kulper was notified by the Commandant of the Coast Guard by letter dated 12 October 1951 that he had been granted security clearance;

(3) That Theodore William Rolfs was screened off the SS PRESIDENT CLEVELAND on or about 19 September

APPENDIX

Affidavit
of
Captain James D. Craik, U. S. C. G.

District of Columbia, ss.

Captain James D. Craik, United States Coast Guard, being first duly sworn on oath, deposes and says that he is Chief, Merchant Vessel Personnel Division, Office of Merchant Marine Safety, United States Coast Guard Headquarters, Washington, District of Columbia, and in such capacity is custodian of the official records of the United States Coast Guard relating to regulations for Security Check and Clearance of Merchant Marine Personnel (33 CFR 121) under the Magnuson Act; that he has examined such records, including those of Lawrence Everett Parker, Fred Harry Kulper, Theodore William Rolfs, Claude F. Payney, Peter Mendelsohn, and Harold Ray Fontaine, plaintiffs in the suit of Parker v. Lester, No. 30484 in the District Court for the Northern District of California, and found:

(1) That Lawrence E. Parker was screened off the SS President Cleveland on 1 February 1951; that the said Parker filed an appeal on 5 February 1951; that an Interim Local Appeal Board heard the appeal on 30 March 1951; that the said Parker was notified by the Commandant of the Coast Guard by letter dated 16 May 1951, that his appeal had been rejected; that by letter dated 11 June 1951, signed by his Attorney, Richard Gladstein, Parker specifically requested that a hearing before the National Appeal Board not be scheduled; that in effect no appeal was sought from 11 June 1951 until 15 December 1953; that during the aforementioned

interim further appeals were provided for by the President's Executive Order No. 10173, as amended by Executive Order No. 10277; that on 15 December 1953, the said Parker requested an appeal hearing and that he be furnished with a Bill of Particulars in accordance with the provisions of 33 CFR 121 and 125, as amended by 18 Federal Register 6941-6942; that pursuant to the said request the said Parker on 11 February 1954 was furnished with the requested Bill of Particulars and was advised that his appeal hearing was scheduled before a Tripartite Local Appeal Board on 6 April 1954; that by letter dated 16 March 1954 the said Parker, through his attorney, requested postponement of the scheduled appeal hearing and requested that additional particulars and clarification of the Bill of Particulars be furnished him; that the request for the postponement of the scheduled appeal hearing was granted; that the request for additional particulars and clarification of the Bill of Particulars is now being processed; that such processing involves checking back with the agencies that originally furnished the derogatory information; that Parker's appeal hearing is now pending; that no date for such hearing has been set;

(2) That Fred Harry Kulper, was screened off the SS INDIAN HEAD as a security risk on 12 April 1951; that the said Kulper filed an appeal on 13 April 1951; that this appeal came on to be heard by a Tripartite Local Appeal Board on 6 September 1951; that the said Kulper was notified by the Commandant of the Coast Guard by letter dated 12 October 1951 that he had been granted security clearance;

(3) That Theodore William Rolfs was screened off the SS PRESIDENT CLEVELAND on or about 19 September

1950; that the said Rolfs ignored this notification of his ineligibility and successfully served aboard the SS LURLINE from 24 October 1950 to 4 November 1950; that said Rolfs was screened on 6 November 1950 from resigning articles on the SS LURLINE; that the said Rolfs acting on the fact that he was screened from the SS PRESIDENT CLEVELAND, filed an appeal on 30 September 1950; that the appeal came to be heard by an Interim Local Appeal Board on 1 December 1950; that the said Rolfs was advised by the Commandant of the Coast Guard by letters dated 15 December 1950, 11 April 1951 and 1 May 1951 that his appeal was rejected; that the said Rolfs filed a second appeal on 18 November 1951; that the appeal came on to be heard by a Tripartite Local Appeal Board on 14 January 1952; that the said Rolfs was advised by the Commandant of the Coast Guard by letter dated 13 March 1953 that his appeal was rejected; that the said Rolfs did not file further appeal from 13 March 1953 until 28 November 1953, as permitted under the Provisions of Executive Order 10173, as amended by Executive Order 10277; that on 28 November 1953, the said Rolfs requested an appeal hearing and that he be furnished with a Bill of Particulars in accordance with the provisions of 33 CFR 121 and 125, as amended by 18 Federal Register 6941-6942; that on 21 April 1954, having been duly furnished with a Bill of Particulars, the said Rolfs' appeal was heard by a Tripartite Local Appeal Board; that the final report and recommendation of the Tripartite Local Appeal Board is now pending.

(4) That Claude F. Payney, was screened off the SS BRAINERD VICTORY on or about 11 November 1950, the SS WAYNE VICTORY on or about 20 December 1950 and the SS MORMACSUN on or about 28 February 1951;

that having been furnished with an official notification of his ineligibility to serve aboard U.S. Merchant vessels under the provisions of Executive Order No. 10173, together with instructions for effecting an appeal, Payney ignored this notification and attempted to serve aboard four (4) vessels prior to his appeal hearing; that as a result of this attempt to evade the notificaton of ineligibility Payney was successfully able to serve aboard the SS JULIA LUCKENBACH from 17 January 1951 to 30 January 1951; and aboard the SS MORMACSUN from 9 February 1951 to 26 February 1951; that the said Payney filed an appeal on 12 January 1951; that this appeal came on to be heard before an Interim Local Appeal Board on 9 March 1951; that the said Payney was notified by the Commandant of the Coast Guard by letter dated 5 April 1951 that he had been granted security clearance;

(5) That Peter P. Mendelsohn was screened off the SS LURLINE on 6 November 1950; that the said Mendelsohn filed an appeal on or about 5 January 1951; that this appeal came on to be heard by an Interim Local Appeal Board on 16 February 1951; that the said Mendelsohn was notified by the Commandant of the Coast Guard by letter dated 2 April 1951 that his appeal has been rejected; that the said Mendelsohn filed an appeal on 13 July 1951; that this hearing was not scheduled prior to the Mendelsohn's conviction on 3 March 1953 for violation of Section 1001, Title 18, United States Code; that no further communication was had with the said Mendelsohn until 30 November 1953 when he reappealed; that on 8 April 1954, having been duly furnished with a Bill of Particulars, the said Mendelsohn's appeal was heard by a Tripartite Local Appeal Board; that the final report and recommenda-

tion of the Tripartite Local Appeal Board is now pending.

(6) That Harold Roy Fontaine, was denied the issuance of a validated U.S. Merchant Mariner's Document on 19 February 1951; that the said Fontaine filed an appeal on 19 February 1951; that this appeal came on to be heard by an Interim Local Appeal Board on 23 April 1951; that the said Fontaine was notified by the Commandant of the Coast Guard by letter dated 12 July 1951 that his appeal had been rejected; that the said Fontaine did not file further appeal from 12 July 1951 until 22 December 1953, as permitted under the provisions of the President's Executive Order No. 10173, as amended by Executive Order No. 10277; that such failure to appeal precluded further review of his case by the National Appeal Board; that on 22 December 1953 Fontaine reappealed and requested a Bill of Particulars; that a Bill of Particulars was forwarded to San Francisco on 1 March 1954; that an appeal hearing before a Tripartite Local Appeal Board is now pending.

(7) That the statistical summary of the Coast Guard Security Program as of 14 May 1954 is as follows:

STATISTICAL SUMMARY

COAST GUARD SECURITY PROGRAM

MERCHANT SEAMAN

as of 14 May 1954

Total Seamen Screened	392,243
Cleared Initially	381,498
Cleared Initially—by Review Board on Evaluation of Information	7,599
Denied Initially	3,146

Appeals by Seamen to Local Appeal Board....	*1,817
Cleared	**989
Denied	***668
Appeals to National Appeal Board.....	412
Cleared	205
Denied	207
Pending	0
Seamen cleared on appeal and then later denied due to further derogatory information.....	4
Appeal Board recommendations Overruled by Commandant (Seamen):	
(a) Local Appeal Board—Favorable Recommendations	10
(b) Local Appeal Board—Unfavorable Recommendations	2
Total Seamen in Denial Status.....	1,952
Total Seamen Appeals Pending.....	160

JAMES D. CRAIK,
Captain, U. S. Coast Guard,
Chief, Merchant Vessel,
Personnel Division.

Subscribed and sworn to this 1st day of June, 1954, in the District of Columbia, before me, the undersigned, a notary public in and for the District of Columbia, as witness my hand and official seal.

EDWARD S. SHANKLE,
[SEAL.] *Notary Public, District of Columbia.*

My Commission Expires Sept. 30, 1957.

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* 13 having second appeal heard at Tripartite level
** 4 having second appeal heard at Tripartite level
*** 9 having second appeal heard at Tripartite level

Appendix AAA

Headquarters, United States Coast Guard,

Washington, 20 July 1942

From: Commandant.

To: District Coast Guard Officers.

Subject: Policy governing denial of access to, or removal of persons from, vessels or waterfront facilities.

Reference: (a) Commandant's Order of 12 May 1942 (CO-661-621-601).

Enclosure: (A) Form for notice of removal or exclusion.

1. Reference (a) is hereby canceled and the following is substituted therefor. District Coast Guard Officers are charged with the responsibility of determining whether or not a person shall be denied access to or be removed from a vessel or waterfront facility. As used in this letter, the term "waterfront facility" is limited to piers, wharves, docks, and similar structures extending beyond the bulkhead line to which vessels may be secured, buildings on such structures extending beyond the bulkhead line to which vessels may be secured, buildings on such structures or contiguous to them, and equipment and materials on such structures or in such buildings. Authority for such denial and removal is found in section 6.4 (a) of the regulations issued pursuant to section 1, title II of the so-called Espionage Act of June 15, 1917 (40 Stat. 220; U. S. C., title 50, sec. 191), and the Order of the Commandant of the Coast Guard dated April 15, 1942, issued pursuant to Executive Order No. 9074.

2. Before reaching a decision to remove or exclude from a merchant vesel or waterfront facility any individual, either as an employee or in any other status, the District Coast Guard Officer shall have found reasonable grounds to believe that the individual is one:

(a) Who would engage in sabotage of the vessel or waterfront facility, or

(b) Who would engage in espionage, or

(c) Who has subversive inclinations indicated by pro-Axis statements or actions, or

(d) Who has a criminal record of such nature as would indicate that his presence in a vessel or on a waterfront facility would lead to serious hazard, or

(e) Who is habitually unfit for duty on board ship by reason of drunkenness, or

(f) Who is mentally incapacitated, or

(g) Whose presence on board a vessel or on a water-front facility would, for any reason not listed herein, constitute a menace to the national security or to the safety of life or property.

3. District Coast Guard Officers are not justified in denying access or removal of persons because of any bona fide labor activities. They shall base their action on public security and safety of life and property. The Commandant desires to emphasize the seriousness of the action authorized by these instructions and he relies upon District Coast Guard Officers to give most careful consideration to all information available before taking the action provided for herein.

4. For emphasis, it is repeated that the responsibility for removal or exclusion rests with the District Coast

Guard Officer, but it shall be the duty of the Captain of the Port to bring to the attention of the District Coast Guard Officer any case within the purview of paragraph 2, with appropriate recommendations. The District Coast Guard Officer may delegate authority to individual Captains of Ports to exercise this authority for him in cases when there is not sufficient time to place the facts before the District Coast Guard Officer without delaying commerce or military movements. If time permits, the District Coast Guard Officer may interview the person concerned prior to ordering his removal or exclusion. Whenever any person is removed or excluded he shall be given by the District Coast Guard Officer or the Captain of the Port, a written statement of the reasons for the action taken, and if the individual so requests, a copy of such statement shall be sent to his designated representative. This statement shall be confined to the reasons for removal or exclusion of the individual and shall not contain evidence or sources of information. A form for such such written statement is appended (enclosure (A)). In no case will seamen's certificates or licenses, lawfully in their possession, be taken from them except through the procedure provided by R. S. 4450, as amended.

5. All cases of denial of access to vessels or removal from vessels shall be reported immediately to headquarters by dispatch with a statement of the reasons therefor, and a full report shall be forwarded to headquarters by mail as soon as possible. A person who has been denied access to or removed from a vessel may, if he desires to submit statements or evidence in his behalf, present such statements or evidence to the

District Coast Guard Officer, or in a port where there is no District Coast Guard Officer, to the Captain of the Port. The District Coast Guard Officer or the Captain of the Port, as the case may be, will if practicable, interview the man concerned and forward the statements or evidence in the case to the Commandant with his recommendations. If the evidence is submitted to a Captain of a Port, he will forward the evidence with his comment via the District Coast Guard Officer. All cases of denial or removal will be reviewed by the Commandant, United States Coast Guard, and his action will be final. If the Commandant concludes that exclusion is not necessary in a particular case, he will so inform the District Coast Guard Officer who ordered the removal or denial and also will inform the individual concerned. When the Commandant, after careful consideration, finds that the best interests of the United States require that an individual be excluded from merchant vessels, his findings will be made known to the person concerned and to all District Coast Guard Officers.

R. R. Waesche.

Notice of Removal or Exclusion from Vessel or Waterfront Facility

——— ———,

(Name of person)

Under the authority vested in me by section 6.4(a) of the regulations issued pursuant to section 1, title II, of the so-called Espionage Act of June 15, 1917 (40 Stat. 220; U.S.C., title 50, sec. 191), and the Order of the Commandant of the U. S. Coast Guard dated 15

April 1942, issued pursuant to Executive Order No. 9074, I have this day
(removed)
(excluded) you from.....(insert name of vessel or waterfront facility) at (name of place), for the following reasons: .....
.....
.....
.....
.....

.....U.S. Coast Guard,
District Coast Guard Officer.
.....Naval District
or
.....U.S. Coast Guard,
Captain of the Port.

.....
(Date)

Chairman, Local Appeal Board,
1111 Times Building,
Long Beach, California.

24 March, 1954.
GN/A8 (LB 445).

Lloyd E. McMurray, Esq.,
Gladstein, Andersen & Leonard,
240 Montgomery Street,
San Francisco 4, California.

Re: Laurence E. Parker

DEAR SIR:

This will acknowledge your letter, dated 19 March, 1954, addressed to Tilden H. Edwards, received from

him this date confirming the transfer of subject appeal from San Francisco to Long Beach, which was accomplished in accordance with your oral request to Mr. Edwards, as appears from my letter to Mr. Parker dated 19 March, 1954, a copy of which was forwarded to you.

This will also acknowledge your request for further particulars dated 16 March, 1954, addressed to Mr. Edwards, which, in view of the transfer of the appeal to Long Beach, I accept as addressed to me.

Inasmuch as the amended rules direct the Commandant of the Coast Guard to prepare the bill of particulars in each of these matters, it is my opinion that the Chairman of the Local Appeal Board is without authority to act on your request for further particulars and that the sole power to do so rests with the Commandant. Accordingly, your request for further particulars submitted on behalf of Mr. Parker has been forwarded to the Commandant for whatever action he may deem appropriate.

I will assume that you will not wish to appear before the Local Appeal Board until after the Commandant has acted upon this motion.

Very truly yours,

(S.) Richard K. Gould,
Chairman, Local Appeal Board.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 302585 1436

v. 2850

In the United States Court of Appeals for the Ninth Circuit

No. 14,081

J. A. LESTER, ET AL., APPELLANTS

vs.

LAWRENCE E. PARKER, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PETITION OF APPELLANTS FOR REHEARING AND SUGGESTION THAT SUCH HEARING BE EN BANC

GEORGE COCHRAN DOUB,
Assistant Attorney General,
LLOYD H. BURKE,
United States Attorney.
SAMUEL D. SLADE,
DONALD B. MAC GUINEAS
Attorneys,
Department of Justice,
Attorneys for Appellants.

In the United States Court of Appeals for the Ninth Circuit

No. 14,081

J. A. LESTER, ET AL., APPELLANTS

vs.

LAWRENCE E. PARKER, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

PETITION OF APPELLANTS FOR REHEARING AND SUGGESTION THAT SUCH HEARING BE EN BANC

Appellants respectfully petition this Court, in accordance with its Rule 23, for a rehearing from the decision rendered August 27, 1956 (per curiam opinion of Circuit Judges McAllister and Pope, with Circuit Judge Healy dissenting) and pray that in view of the major issue of public and national policy involved such rehearing should be *en banc*.

STATEMENT OF FACTS

Since our original brief was submitted in typewritten form pursuant to leave granted by the Court, we briefly restate the facts here for the convenience of the Court in considering this motion.

This is a class action brought by several merchant seamen against local officials of the Coast Guard to enjoin as unconstitutional the enforcement of the merchant seamen screening program administered by the Coast Guard under the Magnuson Act (Act of August 9, 1950, 64 Stat. 427, 50 U.S.C. 191), Executive Order 10173, as amended (15 F.R. 7005, 16 F.R. 7537, 17 F.R. 4607), and regulations promulgated thereunder by the Commandant of the Coast Guard (15 F.R. 9327, as amended, 33 C.F.R. 1955 Pocket Supp., §§ 121.15(e), 121.21(a)).

On the seamen's prior appeal from a final decree, this Court upheld the validity of the Act and indicated no doubt as to the validity of the Executive Order, but ruled that the Coast Guard regulations, issued pursuant to the Executive Order, which set up an administrative hearing procedure denied due process of law "in respect to notice and opportunity to be heard" because they prohibited the disclosure to the seaman of the source of the information against him and the identity of informants and denied any opportunity to cross-examine such informants. This Court directed the issuance of an injunction against enforcement *of the regulations. Parker* v. *Lester,* 227 F. 2d 708, 714, 715, 720, 723-4.

The Coast Guard, in order to comply with this Court's ruling, and as foreseen by this Court (227 F. 2d at 723), issued revised regulations, effective May 1, 1956 (21 F.R. 2814) which changed the provisions of the former regulations with respect to notice to the seamen and denial of opportunity to confront and cross-examine informants. Under the current regulations, seamen such as appellees who were determined

to be security risks under the former regulations invalidated by this Court may apply for security clearance under the new procedure (§§ 121.27, 121.29; 21 F.R. 2817).

Executive Order 10173, as amended, prohibits any seaman from sailing on a merchant vessel unless the Commandant is satisfied that the seaman's character and habits of life are such as to authorize the belief that his presence on board would not be inimical to the security of the United States (17 F.R. 4607).

On remand, the District Court on July 12, 1956, issued a final order and decree which not merely enjoins appellants from enforcing the regulations which this Court held invalid but also requires them to treat appellees, who have never been determined not to be security risks, as entitled to sail on vessels *now,* notwithstanding the flat prohibition of Executive Order 10173.[1] The decree requires appellants to issue to appellees validation endorsements on their Merchant Mariner's Documents just as if appellees had been determined not to be security risks, although in fact no such determination has been made. The decree permits the Coast Guard to initiate proceedings under the new regulations to determine whether or not appellees are security risks, but appellees must be permitted to sail on merchant vessels unless and until it is determined at conclusion of the administrative process that they are security risks.[2]

---

[1] Pursuant to this Court's order of July 23, 1956, this appeal was heard on an unprinted record.

[2] The final paragraph of the decree seems to permit the suspension of a seaman's right to sail after he has had a hearing under the new regulations but prior to the Commandant's final determination. But the new regulations make no provision for such a suspension during the pendency of the administrative proceeding.

The Government appealed from the District Court's decree of July 12, 1956, on the ground that those of its provisions which require the Coast Guard to treat appellees as entitled to sail on vessels now, although the Commandant has never found that they are not security risks, are not in accordance with the opinion and mandate of this Court on the prior appeal and in effect invalidate the Executive Order.

This Court's per curiam opinion of August 27, 1956, affirms the decree of the District Court, holding that it is in conformity with this Court's prior decision.

STATUTE AND EXECUTIVE ORDER INVOLVED

The Magnuson Act (Act of August 9, 1950, 64 Stat. 427, 50 U.S.C. 191) provides:

> "Whenever the President finds that the security of the United States is endangered by reason of actual or threatened war, or invasion, or insurrection, or subversive activity, or of disturbances or threatened disturbances of the international relations of the United States, the President is authorized to institute such measures and issue such rules and regulations—
>
> * * * * *
>
> "(b) to safeguard against destruction, loss, or injury from sabotage or other subversive acts, accidents, or other causes of similar nature, vessels, harbors, ports, and waterfront facilities in the United States, the Canal Zone, and all territory and water, continental or insular, subject to the jurisdiction of the United States."

Pursuant to this Act, the President issued Executive Order 10173 (October 18, 1950, 15 F.R. 7005) in which he made the statutory finding that the security of the United States is endangered by subversive activity, vested enforcement of the Act in the Coast Guard, and provided:

> "No person shall be issued a document required for employment on a merchant vessel of the United States nor shall any person be employed on a merchant vessel of the United States unless the Commandant is satisfied that the character and habits of life of such person are such as to authorize the belief that the presence of the individual on board would not be inimical to the security of the United States:"
>
> * * * * *
>
> "The Commandant may require that all licensed officers and certificated men who are employed on other than the exempted designated categories of merchant vessels of the United States be holders of specially validated documents."[3]

REASONS FOR GRANTING THE PETITION FOR REHEARING

The Court's opinion seems to us to rest upon a basic misunderstanding of the operation of the screening program under the Magnuson Act. We agree with the Court that appellees and seamen in similar position who were found to be security risks under regulations of the Coast Guard held to be a denial of due process by this Court's earlier opinion in the case, 227 F. 2d 708, are

[3] As amended by Executive Order 10277 (16 F.R. 7537) and Executive Order 10352 (17 F.R. 4607).

entitled to the same opportunity to work at their chosen trade as seamen who have never been found to be security risks. But the Court's opinion erroneously assumes that a seaman who has not been found to be a security risk is without more entitled to sail on merchant vessels. That assumption is contrary to the provision of the Executive Order that no one may sail on a merchant vessel unless he is affirmatively found by the Commandant not to be a security risk. Concededly, no such finding has been made as to appellees. The Court's holding that appellees are nonetheless entitled to sail now amounts to an invalidation of the Executive Order *sub silentio,* without adequate legal basis, and gives appellees a preferential status over all other seamen.

Appellees, who were found to be security risks under the prior invalid regulations of the Coast Guard, are accorded by the Court's order a right to sail, a right which no other American seaman has under the Magnuson Act and the Executive Order. Accordingly, the Court's order represents (1) an abortion of the national policy embodied in the Magnuson Act and the Executive Order; and (2) preferential discriminatory treatment in favor of these appellees. Although the Court has never indicated any doubt as to the validity of the Magnuson Act and the Executive Order, its opinion in effect nullifies their operation. This is a matter of grave public importance which, we submit, warrants a rehearing.

ARGUMENT

Under the Executive Order and the Coast Guard Regulations No Seaman Is Entitled to Sail on Merchant Vessels until the Commandant Affirmatively Determines that He Is not a Security Risk. The Court's Opinion Erroneously Dispenses With This Requirement as to Appellees.

The basic issue involved in this appeal is whether appellees are entitled to sail on merchant vessels now, or whether the same rule applies to them as applies to all other seamen, i.e., that they may not sail until they satisfy the Commandant that they are not security risks.

We agree that, in the light of this Court's ruling on the first appeal, the Commandant's determinations that appellees are security risks are a legal nullity and that appellees' rights should be decided just as if those security determinations had never been made. We likewise agree with the Court's objective in endeavoring to give appellees equality of treatment with all other seamen in comparable position; i.e., any other seaman whose security status has never been determined. But because the Court misunderstood what the position of seamen who have never had a security determination is, the result of the opinion is to place appellees in a preferential position over all other seamen.

The heart of the Court's opinion and its basic error is the following statement:

> " * * * The only difference between the plaintiffs and those they represent on the one hand, and all the seamen who are currently employed and working on the other, is that the former have been screened off, and denied employment, under the procedures which our decision found to be void and of no effect."

In truth the fact that appellees have been invalidly "screened off" is *not* the only difference between them and all seamen currently sailing. The vital difference between appellees and all seamen working is that the latter have affirmatively satisfied the Commandant that they are not security risks, whereas appellees have not so satisfied the Commandant.

As an illustration, assume the case of a seaman who has just received his Merchant Mariner's Document evidencing his qualifications as an able seaman [4] but who (like appellees) has never obtained security clearance from the Commandant. Is he eligible to sail on merchant vessels? The answer is plainly "no". For both the Executive Order (quoted at page 5 above) and the current regulations of the Coast Guard (§§ 121.01, 121.07, 121.11, 121.21; 21 F.R. 2814-7) prohibit any seaman from sailing unless the Commandant has been satisfied that he is not a security risk, which is evidenced by the placing of a "special validation endorsement" on his Merchant Mariner's Document.

Concededly appellees have not satisfied the Commandant that they are not security risks. Why then should they be entitled to sail now without complying with the requirement of the Executive Order imposed on every other seaman? [5] Surely the Court did not mean to hold that, because appellees have been subjected to a hearing procedure ruled unconstitutional by the Court, they need not comply with requirements of the Executive Order and the current regulations which have not been

---

[4] Described in 46 U.S.C. 672 as a "certificate of service as able seaman."

[5] The current regulations permit appellees to apply for security clearance (§ 121.29; 21 F.R. 2817).

ruled invalid.[6] Yet this is precisely the result of the Court's ruling.

Perhaps the Court has been confused by the provisions of the current regulations that seamen who now have special validation endorsements on their Merchant Mariner's Documents would, in the event the Commandant should receive new security information about them, be entitled to continue to sail on vessels during the pendency of any administrative proceeding which might be brought to determine whether they are now security risks (§§ 121.09, 121.11, 121.21; 21 F.R. 2815-7). But seamen who now have special validation endorsements on their Merchant Mariner's Documents are not in the same position as appellees. All such seamen had satisfied the Commandant that they were not security risks in order to obtain their special validation endorsements, whereas appellees have, of course, never satisfied the Commandant that they are not security risks.

The Court's apparent misunderstanding of the way the program operates is further reflected in its statement:

> For the defendants now to insist that plaintiffs remain in this [screened off] status, thus improperly fastened upon them, emphasizes the need for the injunction now issued. Defendants are but trying to give effect to the old regulations by which they denied these men employment by thus undertaking to keep them suspended until defendants get around to hearings under the new regulations.

---

[6] In its opinion of August 27, 1956, this Court specifically said: "The question of their [the current regulations'] sufficiency to meet the requirements of due process does not arise upon this appeal."

We do not insist that appellees remain in the status of seamen who have been determined to be security risks. On the contrary, we agree that the Commandant's past security determinations as to appellees should be eliminated in the consideration of their present status. But this merely leaves appellees in the position of seamen whose security status has not been determined one way or another. And under the Executive Order and the current regulations seamen in that undetermined status are not entitled to sail. Far from "trying to give effect to the old regulations . . . " the Government is merely asking that appellees be given the same status under the current regulations as any other seaman whom the Commandant has not yet determined to be entitled to security clearance.

The opinion of the Court enunciates the sound principle that the appellees should be accorded the same treatment as other seamen but, instead of adhering to that standard of equality, the opinion requires the Commandant to accord unequal preferential treatment in favor of the appellees.

The only basis on which the Court could properly conclude that appellees need not comply with the requirement of the Executive Order and the regulations that they obtain security clearance before sailing would be a conclusion by the Court that the provisions of the Executive Order and the current regulations which impose that requirement are either lacking in statutory authority or are unconstitutional. But neither opinion rendered by this Court in this case casts any doubt upon the validity of the Executive Order or the current regulations, and there is, we submit, no sound legal basis for holding them invalid.

Where, as here, questions of national security are involved, the validity of the requirement that seamen whose security status has not yet been determined shall not sail and thus have the opportunity to commit acts endangering the national security during the pendency of the administrative process which determines whether or not they are security risks seems plain. *Bowles* v. *Willingham,* 321 U.S. 503, 519-21; *Yakus* v. *United States,* 321 U.S. 414, 437; *Fahey* v. *Mallonee,* 322 U.S. 245, 253-4; *Ewing* v. *Mytinger & Casselberry, Inc.,* 339 U.S. 594, 599-600; *Central Union Trust Co.* v. *Garvan,* 254 U.S. 554, 566.

Imposing such a precautionary requirement during the pendency of the administrative process is no more a denial of due process than is the exercise by the courts of their authority to issue a restraining order pending trial or appeal of a case.

The Court's opinion, by invalidating *sub silentio* the Executive Order, leaves the national security open to the very risks which the Magnuson Act was enacted to avoid, risks which this Court recognized in its first opinion are within the competence of the legislative and executive branches to evaluate and prevent (227 F. 2d at 718).

CONCLUSION

The Court's opinion is, we submit, based upon a misconstruction of the merchant seamen's security program. It proclaims that the underlying principle of the decree shall be that of equality as between appellees and other seamen and then requires the Commandant to accord unequal discriminatory treatment in favor of appellees. In effect it invalidates Executive Order 10173, as amended, and nullifies the operation of a pro-

gram affecting the national security, in respect to which the Court has not ruled invalid. The petition for rehearing should be granted. Because of the vital national interests involved we request that the case be reheard *en banc*.

Respectfully submitted,

GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
DONALD B. MACGUINEAS,
Attorneys, Department of Justice,
Attorneys for Appellants.

CERTIFICATE

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 399272 285

No. 14083

United States
Court of Appeals
For the Ninth Circuit.

JESUS ELIZARRARAZ,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of The United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 2-12-54

No. 14083

United States
Court of Appeals
For the Ninth Circuit.

JESUS ELIZARRARAZ,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of The United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JOHN F. SHEFFIELD,
412 West Sixth Street,
Los Angeles 14, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;

CLYDE C. DOWNING,
ROBERT K. GREAN,
Assistants United States Attorney;
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court, Southern District of California, Central Division

No. 14488—PH

JESUS ELIZARRARAZ,

Plaintiff,

vs.

JAMES T. McGRANERY, in the Capacity of the Attorney General of the United States,

Defendant.

PETITION FOR DECLARATION OF UNITED STATES NATIONALITY UNDER SECTION 503, NATIONALITY ACT OF 1940, TITLE 8 U.S.C. 903

Plaintiff above named complains of defendant above named and for cause of action alleges:

I.

That the defendant is now and at all times herein mentioned for the purpose of this proceeding, has been the Attorney General of the United States of America.

II.

That the plaintiff, Jesus Elizarraraz, is a national of the United States having been born in the City of Los Angeles, County of Los Angeles, State of California, on the 9th day of November, 1912.

III.

That this petition and proceeding is filed pursuant

to and under the authority of Section 503 of the Nationality Act of 1940 [2*] (54 Stat. 1471, Title 8 U.S.C. Section 903).

IV.

That the defendant in his capacity as the Attorney General of the United States and as the Executive Head of the Department of Justice, has denied the plaintiff his rights and privileges as a national of the United States in that he has decided and determined that the plaintiff is not a national of the United States.

V.

That the plaintiff herein is a permanent resident of the City of Los Angeles, County of Los Angeles, State of California, and is a permanent resident of the district within which is located the above entitled District Court of the United States.

VI.

That plaintiff is desirous of having the above-entitled court declare him to be a national of the United States under Section 503 of the Nationality Act of 1940.

Wherefore, plaintiff prays judgment against the defendant as follows:

1. That plaintiff be declared by the above-entitled court to be a national of the United States.

2. That any and all proceedings in the Department of Justice, Immigration and Naturalization

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Service be suspended until a final determination be had in the above-entitled proceeding.

3. For such other and further relief as may in the discretion of the court seem meet and just in the premises.

/s/ JOHN F. SHEFFIELD,
Attorney for Plaintiff. [3]

State of California,
County of Los Angeles—ss.

Jesus Elizarraraz being by me first duly sworn, deposes and says: that he is the plaintiff in the above-entitled action; that he has read the foregoing petition for declaration of U. S. Nationality under Section 503, Nationality Act of 1940, 8 U.S.C. 903 and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it is true.

Subscribed and sworn to before me this 30th day of August, 1952.

/s/ JESUS ELIZARRARAZ.

[Seal] /s/ JOHN F. SHEFFIELD,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed September 8th, 1952. [4]

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S COMPLAINT

Comes now the defendant, James P. McGranery, in the capacity of the Attorney General of the United States, through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California, Clyde C. Downing and Robert K. Grean, Assistants United States Attorney for the Southern District of California, and in answer to plaintiff's complaint herein admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Referring to the first averment of paragraph II of said complaint, denies that the plaintiff is a national of the United States. Referring to the remainder of the allegations in paragraph II of said complaint, defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and on that ground denies the remainder of the allegations of paragraph II of said complaint. [5]

III.

Defendant neither admits nor denies the allegations contained in paragraph III of plaintiff's com-

plaint, on the ground that said allegations are conclusions of law.

IV.

Admits that the Attorney General of the United States has determined that the plaintiff is not a national of the United States, but denies that the plaintiff's rights and privileges as a national of the United States have been denied him on the ground that said allegation is a conclusion of law.

V.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V of said complaint, and on that ground denies each and every allegation therein contained.

VI.

Denies that plaintiff is entitled to be declared a national of the United States by this Court.

For a Further, Separate, Second and Affirmative Defense, Defendant Alleges:

I.

That plaintiff, Jesus Elizarraraz, was born to parents who were at the time of his birth natives and citizens of Mexico, and that the plaintiff at birth was a national of Mexico.

II.

That in or about 1932 plaintiff took up residence in Mexico, and in 1940 became a member of the Mexico City Police Force.

III.

That plaintiff entered on duty as a police officer in the Federal District of Mexico on April 1, 1943, and served in that capacity until March 11, 1947.

IV.

That plaintiff accepted and performed the duties of a police officer [6] under the Government of the Republic of Mexico.

V.

That said employment under the Government of Mexico was employment for which only nationals of Mexico were and are eligible.

VI.

That the plaintiff thereby expatriated himself and lost his claim to nationality of the United States, pursuant to Section 401 (d) of the Nationality Act of 1940 [8 U.S.C. 801 (d)].

For a Further, Separate, Third and Distinct Defense, Defendant Alleges:

I.

That plaintiff's complaint fails to state a claim upon which relief can be granted.

Wherefore, defendant prays that plaintiff's complaint be dismissed, the relief prayed for therein be denied, and for such other relief as to the Court seems just in the premises.

WALTER S. BINNS,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of service by mail attached.
[Endorsed]: Filed November 10, 1952. [7]

[Title of District Court and Cause.]

TRIAL STIPULATION

It Is Hereby Stipulated, by and between the above-named parties, through their respective counsel, that the following facts are agreed to and require no proof:

1. Plaintiff was born at Montebello, California, on November 9, 1912;

2. At the time of plaintiff's birth, his parents were natives and citizens of the United States of Mexico;

3. Some time in 1932 plaintiff took up residence in the United States of Mexico and thereafter, on April 1, 1943, entered on duty as a police officer of the police force of the Federal District of the United States of Mexico, and served in that capacity until some time either in 1945 or 1947; and

4. Said service took place during a period of

time when the United States of Mexico was at war, it being agreed that Mexico declared war on May 22, 1942. [9]

It Is Further Stipulated that there are attached hereto and introduced into evidence as defendant's exhibits the following items:

1. Translation of pertinent portions of the Political Constitution of the United States of Mexico, particularly Articles 30 and 32;

2. Certificate dated February 23, 1953, authenticated by the Vice Consul of the United States of America at Mexico City, in the Spanish language with a certified translation attached thereto;

3. Transcripts from the publication "Regulations of the Preventive Police of the Federal District," certified as true and correct by the Vice Consul of the United States of America, with certified translation attached thereto; and

4. Certified copy of the personnel record of the plaintiff as it appears in the files of the Federal District of Mexico, authenticated by the Vice Consul of the United States of America, with certified English translation attached thereto.

It Is Further Stipulated that those exhibits enumerated above which are excerpts of the laws of Mexico or regulations of the police force are true and correct copies thereof.

It Is Further Stipulated that if William B. Stern were called as a witness, he would testify as set out

in his affidavit, which may be admitted in evidence as defendant's Exhibit 5, but to which counsel for the plaintiff reserves the right to object to the weight and sufficiency thereof.

Dated: March 9, 1953.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

/s/ JOHN F. SHEFFIELD,
Attorney for Plaintiff.

It Is So Ordered:
This ..... day of March, 1953.

.....
United States District Judge.

State of California,
County of Los Angeles—ss.

America I. Thatcher, being first duly sworn, deposes and says that she is an official interpreter and translator for the County of Los Angeles, State of California; that she has full and complete knowledge of the English and Spanish languages; that she has translated the attached document from

Spanish to English, and that the foregoing is a true and correct translation of said document.

/s/ AMERICA I. THATCHER.

Subscribed and sworn to before me this 5th day of March, 1953.

[Seal] /s/ BARBARA S. MURPHY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 8, 1955. [11]

Translation from Spanish.

"Political Constitution of the
United States of Mexico"
(with all amendments up to September 30, 1949)

Title I.

Chapter II.

Regarding Mexicans

Article 30. Mexican nationality is acquired by birth or naturalization.

A. The following are Mexican by birth:

1. Individuals born within the territorial limits of the Republic, irrespective of the nationality of their parents.

II. Individuals born in foreign countries of

Mexican parents; of Mexican father and alien mother; or of Mexican mother and unknown father.

III. Individuals born on board Mexican war or merchant vessels or aircraft.

B. The following are Mexican by naturalization:

I. Aliens who obtain naturalization papers from the Ministry of Foreign Relations.

II. Alien women who marry Mexicans and live or establish domicile within the territorial limits of the republic.

Article 31. .....

Article 32.

Mexicans shall be preferred under equal circumstances to aliens for concessions of all kinds, and for all Government posts, offices or commissions where citizenship is not indispensable. No alien may serve in the army, nor in the police corps, nor in any other department of public safety during times of peace.

Only Mexicans by birth may serve in the navy or national air force or hold any post or commission therein. The same requisite shall apply to captains, pilots, masters, chief engineers, mechanics, and, in a general way, to the entire crew of any vessel or aircraft sailing under the Mexican flag or the Mexican marine flag. It shall likewise be necessary for all port captains, all persons engaged in pilotage work and commanders of aerodromes to be Mexicans by birth, likewise for any person who discharges the

duties of customs agent in the Republic. (Amended by decree dated December 31, 1943, and published in "Diario Oficial" of February 10, 1944.) [12]

State of California,
County of Los Angeles—ss.

America I. Thatcher, being first duly sworn, deposes and says, that she is an official interpreter and translator for the County of Los Angeles, State of California; that she has full and complete knowledge of the English and Spanish languages; that she has translated the attached document from Spanish to English, and that the foregoing is a true and correct translation of said document.

/s/ AMERICA I. THATCHER.

Subscribed and sworn to before me this 5th day of March, 1953.

[Seal] /s/ BARBARA S. MURPHY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 8, 1955. [13]

Translation from Spanish.

Stamp of the Federal Executive Power,
Mexico, D. F.,
United States of Mexico.

Division: Police Headquarters of the Federal District.

Section: Private Secretary's Office.

Subject Matter: Certification.

The Citizen General of Division Miguel Molinar S., Chief of Police of the Federal District:

Certifies

That the Regulations of the Preventive Police of the Federal District, have been in force since they were decreed by the Citizen General of Division Manuel Avila Camacho, then President of the United States of Mexico, on November 12, 1941, and published in the Official Journal on December 4 of the same year 1941, various amendments having been made to the same by decrees dated 2nd and 25th of April, 1942, 18th of February, 14th of March, 22nd and 30th of December, 1944, and 9th of March, 1945.

The Certificate herein is issued in Mexico City, Federal District, on the twenty-third day of the month of February, nineteen hundred and fifty-three.

[Illegible Signature]
Gen. of Div. Miguel Molinar S.

Stamp which reads:
Police Headquarters,
Division of the Federal District,
United States of Mexico.

Headquarters.
aas. [14]

State of California,
County of Los Angeles—ss.

America I. Thatcher, being first duly sworn, deposes and says that she is an official interpreter and translator for the County of Los Angeles, State of California; that she has full and complete knowledge of the English and Spanish languages; that she has translated the attached document from Spanish to English, and that the foregoing is a true and correct translation of said document.

/s/ AMERICA I. THATCHER.

Subscribed and sworn to before me this 5th day of March, 1953.

[Seal] /s/ BARBARA S. MURPHY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 8, 1955. [17]

Translation from Spanish.

Transcripts made from the Publication
(Regulations of the Preventive Police* of the Federal District)
"Reglamento de la Policia Preventiva del D. F."

Regulations of the Preventive Police of the Federal District.

At the margain: A seal with the national shield of Mexico reading: "United States of Mexico—Presidency of the Republic."

Manuel Avila Camacho, Constitutional President of the United States of Mexico, to its inhabitants hereby makes known:

That based upon the provisions of articles 21, 24, subdivision III, and 7 Transitory of the Organic Law of the Federal District and Territories, dated December 31, 1928, and * * * I have deemed it proper to issue the following * * *

Chapter II.

Requirements

Article 31.

The requirements for membership in the police force are as follows:

I. The applicant must be a Mexican citizen by birth.

II. The applicant must be 21 years of age, without having yet reached his 35th birthday, and must

*Translator's note. City Police.

have full exercise of his (or her) civil and political rights at the time of appointment.

III. The applicant must have completed and passed the necessary studies given at the police academy.

IV. The applicant must have executed and agreed upon the respective contract for enrollment (or registration).**

V. The applicant must be of reputable good conduct.

VI. The applicant must not have been convicted for an infamous crime, in final judgment, or be under prosecution.

VII. The applicant must not be suffering from a contagious disease nor have any physical defects which might handicap said applicant in the performance of his duty.

Transitory Provisions

Article 3.

The Organic Regulations for the Federal District Police Department, promulgated into law on the twenty-second day of the month of September, nineteen hundred and thirty-nine, are hereby abrogated.

In compliance with the provisions of Subdivision I of Article 89 of the Political Constitution of the United States of Mexico, and for their due publication and enforcement, I hereby promulgate the Regulations herein contained, at the official resi-

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**Can be translated either way.

dence of the Federal Executive Power in the City of Mexico, Federal District, on the 12th day of November nineteen hundred and forty-one. Manuel Avila Camacho. Initial.—Give execution thereto. Chief of the Department of the Federal District, Javier Rojo Gomez. [18]

Initial.

Decree of April 2nd, 1942, published in the "Diario Oficial" (Official Journal) on the 25th of the same month and year. [19]

State of California,
County of Los Angeles—ss.

America I. Thatcher, being first duly sworn, deposes and says, that she is an official interpreter and translator for the County of Los Angeles, State of California; that she has full and complete knowledge of the English and Spanish languages; that she has translated the attached document from Spanish to English, and that the foregoing is a true and correct translation of said document.

/s/ AMERICA I. THATCHER.

Subscribed and sworn to before me this 5th day of March, 1953.

[Seal] /s/ BARBARA S. MURPHY,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires April 8, 1955. [22]

Translation from Spanish.

(Front)

Register of the Personnel of the Department of the Federal District

(Photograph)

, (Illegible)

——— of birth: Los Angeles, California.

Date of birth: November 19, 1912.
Domicile: Calle Republica #13 Col. Portales.
Profession: Farmer.

right thumb
V 4333
V 3222
(Fingerprint)

J. Jesus Elizarraraz Vasquez. 1912.

(Reverse)

File No. 58—

Name: J. Jesus Elizarraraz Vazquez.

mchg. Employment: Police officer.

Offices: Police Headq.
Salary: .....
(Promotion)* (Appointment) Apr. 1, '43.
(Dismissal)* (Termination) Jan. 1, '44.

mchg. Employment: Police officer.
Offices: 6th Company Police Headq.
Salary: 120.00.
(Promotion)* (Appointment Jan. 1, '44.
(Dismissal)* (Termination) Mar. 11, '47. [23]

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*Translator's note: Can be translated either way.

Translation from Spanish.

File J—1/13 1/58586

(Dismissal or Termination /47)

Archive

Department of the Federal District
Personnel Office
Year 1944

Elizarraras Vazquez, Jesus

Police
Police Headquarters

Folder reviewed——
Cards reviewed (illegible initials)
File contains ..... Pages
Number and letter [24]

Translation from Spanish.

Department of the Federal District
Police Headquarters
Police School (or Academy)* No. 59.

(Photograph front view) (Photograph side view)

(Enrollment)*

(Registration): Police Candidate Jesus Elizarraras Vazquez.

---

*Translator's Note: Can be translated either way.

Native of Penjamo, Gto.
Son of: Pascual Elizarraras, and of Conrada Vazquez.
Age: 30 years.
Status: Married.
Occupation: Employee (or clerk).
Height: 1. -0.
Weight: 75.5 Kg.
Color: Olive skin.
Hair: Dark brown.
Forehead: Large.
Eyebrows: Black—thin.
Eyes: Light brown.
Nose: Rectilinear.
Mouth: Medium.
Chin: Round.
Distinguishing marks: None.
"Special Services"

Was admitted as Pupil-Police Officer Candidate April 1st, 1943.

Has agreed to the following clauses:

I. To take the course prepared by the Plan of Instruction of the School for a period of not less than three months, after previous examination for admission to which he will be subjected.

II. He obligates himself to attend his classes daily and to observe good conduct, without which

requirement he will not have the right to aspire to the post of Police Officer.

III. To have the right to promotion (or appointment)* to police officer he must have passed all the different subjects at the end of the course.

IV. As an inducement for his studies, he shall be paid (one peso daily) during all the time that his instruction lasts, and he shall be provided, besides, with the respective clothing.

V. In order to guarantee what is set forth in the previous paragraph, the interested party shall post the respective security or bond in the amount of (One Hundred Fifty Pesos), total amount of three months instruction, plus Sixty Pesos, value of the Equipment.

VI. If in the first month he has not Not Passed the subjects in the course, he shall be dismissed (or terminated)* and the interested party or his bondsman obligates himself to pay the total amount for the (PRE) or the one peso daily given to him.

VII. Upon Accepting the above Conditions, I bind myself to render My Services to the Police Corps, for a minimum period of 2 years, and in agreement therewith I sign before the witnesses who are shown below. Mexico, D. F., April 1st, 1943.

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*Can be translated either way.

Right Thumb.

(Fingerprint).

/s/ JESUS ELIZARRARAZ,
Signature of the interested party.

Witness:

/s/ JESUS VILLA.

Witness:

[Signature Illegible.]

Translation from Spanish.

The Undersigned Certifies that the party who has made the registration herein is in condition to serve in the Police Force because he does not suffer chronic or contagious diseases or lameness which might hinder his freedom of action, and has no physical defect of a monstrous nature and is not deaf, an Idiot or Insane.

[Illegible Signature,]
Physician and Surgeon.

Dates
Day.... Month..... Year.... Absences.....

Dates
Day.... Month..... Year.... Penalties.....

The Chief of the Office of Personnel and Supplies, of the Police Headquarters for the Federal

District, of which Gen. of Inf. Fausto Cardenas Sagaseta, is Chief,

Certifiies

That the registration herein is that of Jesus Elizarraras Vazquez, Original, which was opened for the interested party upon his entering the Corps.

Mexico, D. F. 1st of April, 1943.

Approved:

Chief of Police.
Chief Col. Int. Pol.

[Illegible Signature.]

ARTURO ROMERO LOZA.

I Attest:

Chief of Supplies, Inf. Col.

[Illegible Signature]

FAUSTO CARDENAS SAGASETA.

(Reverse)

Department of the Federal District—
Personnel Office.

The person mentioned in this registration was presented on this date at this office for his identification.

Mexico, D. F., April 1st, 1943.

[Illegible Signature,]
Chief of the Office. [26]

Translation from Spanish.

Stamp: Federal Executive Power,
Mexico, D. F., United States of
Mexico.

Department of the Federal District.

Division: Police Headquarters of the Federal District.

Section: Supply.

Number of Communication: 12383.

File: N-3.

Subject Matter: Requesting authorization to promote (or appoint)* C. Jesus Elizarraras Vazquez as Police Office Candidate.

59

Mexico, D.F., 1st of April, 1943.

To the C. Chief of the Department
of the Federal District,
Personnel Office.
In Person.

I am enclosing herein in 13 pages, the file of C. Jesus Elizarraras Vazquez, so that the Department under your esteemed care, will authorize his promotion (or appointment)* as Police Candidate

*Translator's Note: Can be translated either way.

under date of the 1st inst., by virtue of the fact that he passed the respective examination for admission.

Very truly yours,
Effective Suffrage.
No Re-election
Col. Acting Chief of Police.

/s/ ARTURO ROMERO L.
ARTURO ROMERO LOZA.

Copy to the Paymaster General of this Headquarters, for his information.

In Person.

Gag.

Translation from Spanish.

Stamp: Federal Executive Power
Mexico, D. F., United States of
Mexico.

(Stamp: General Register 1598.)

Division: Police Headquarters of the F. D.

Section: Supplies.

No. of Communication: 19792.

File: N-3.

Subject Matter: Advising dismissal (or termination)* of C. Jesus Elizarraras Vazquez as Police officer Candidate and his Promotion (or appointment)* as Police Officer.

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*Can be translated either way.

17641

Mexico, D. F., June 2, 1943

Chief of the Department of the
Federal District,
Personnel Office,
In Person.

For your information and approval, I am pleased to advise you that I have ordered that Candidate Number 59, C. Jesus Elizarraras Vazquez, be Dismissed (or terminated)* in such capacity and be promoted (or appointed)* as Police Officer under date of the 1st inst., by virtue of his having passed the last examination to which he was subjected in the Police School.

Very truly yours,

Effective Suffrage.
No Re-Election.
Col. Acting Chief of Police,

/s/ ARTURO ROMERO,
ARTURO ROMERO LOZA.

Stamp:

Department of the Federal District,
June 15, 1943,
Personnel Office.

Copy to the General Paymaster of this Headquarters, for his information.
In Person.

---

*Translator's Note: Can be translated [28] either way.

Translation from Spanish. 58586

Stamp:

Government of the Federal District,
Police Headquarters,
United States of Mexico.

Supplies.

The C. General Chief of Police of the Federal District has taken the determination to dismiss (or terminate)* on this date the Polyglot Police Officer 3983 of the Grenadiers Jesus Elizarraras Vazquez at his request.

Mexico, March 11, 1947

Salvador Espinoza de Los Monteros, Chief of Supplies Section of the Police Headquarters.

Certifies

That Polyglot Police Officer 3983 of the Grenadiers, C. Jesus Elizarraras Vazquez, referred to in the above determination, has been dismissed (or terminated)* on this date.

Mexico, March 11, 1947.

[Illegible Signature]

SEM/CRH/eg.

---

*Translator's Note: Can be translated [29] either way.

Translation from Spanish. 58586

(Illegible pencilled notations.)

Mexico, D. F., March 18, 1952.

C. Chief of the Personnel Office
of the Department of the F. D.
In person..

J. Jesus Elizarraraz Vazquez, respectfully requests that a certificate be issued to him for the services he rendered in the Department of the F. D., from the year 1940 to 1947, as police officer attached to the Police Headquarters.

(Private Matter)

Thanking you for your attention to this matter, I am your attentive and true servant,

[Illegible signature.]

Stamp: Government of the Federal District, Personnel Office, March 24/52, Processing Office specified.

Stamp: Department of the Federal District, March 18. 1952, Personnel Office. [30]

Translation from Spanish.

Personnel Office of Processing,
J-24/ (illegible number)

Certificate for Services

Mexico, D. F., March 26, 1952.

C. J. Jesus Elizarraraz Vazquez.
In Person.

In accordance with your respective request, I advise you that in the archive of this office there is a record that the following appointments were conferred upon you, on the dates which are mentioned:

Employment: Police officer.
Office: Police Headq.
Salary: .....
(Appointment)* (Promotion) Apr. 1, '43.
(Termination)* (Dismissal) Jan. 1, '44.

Employment: Police officer (6th Company).
Office: Police Headq.
Salary: $120.00.
(Appointment)* (Promotion) Jan. 1, '44.
(Termination)* (Dismissal) Mar. 11, '47. Left.

Very truly yours,

Effective Suffrage.
No Re-Election.
Chief of the Personnel Office.

/s/ E. CORONA,
ERNESTO CORONA.

Stamp: Department of the F. D. (illegible) 1952, Illegible.

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*Translator's note: Can be translated either way.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM B. STERN

State of California,
County of Los Angeles—ss.

William B. Stern, being first duly sworn, deposes and says:

I.

I studied law at the Universities of Wurzburg, Munich and Berlin from 1928 to 1932 and received the degree of doctor of both laws from the first-mentioned University in 1933. I have been the Foreign Law Librarian of the Los Angeles County Law Library since 1939. As such I am in charge of that Library's collection of books on foreign law which total well nigh 100,000 volumes. Among them, there are several thousand volumes of books on Mexican law. In my capacity as Foreign Law Librarian, I am answering questions of attorneys and others on foreign law and I have testified on foreign law in the United States District Court for the Southern District of California, the Superior Courts of the State of California in Los Angeles, San Bernardino, Ventura, Orange, San Diego, Kern and Alameda Counties and in the City and County of San Francisco, in the Municipal Court of Los Angeles [43] and in courts of the State of Oregon and the State of Montana, and elsewhere. I have written several articles on foreign, including Mexican law which were published in legal periodicals, one of which in Spanish translation in the law review of the law

school of the Mexican National University. I am familiar with the law of Mexico relating to nationality and the Federal District of Mexico, and at the request of Robert K. Grean, Assistant United States Attorney, Esq., Los Angeles, California, I have informed myself with the laws and regulations concerning the police force in the Federal District of Mexico and Mexican federal laws and regulations concerning the latter police force. I am familiar with the Spanish language.

II.

I have been informed by Robert K. Grean, Esq., Assistant United States Attorney, Los Angeles, California and John F. Sheffield, Esq., Attorney at Law, Los Angeles, California about the following factual situation and have been asked by them to answer the following questions:

Assuming (1) that plaintiff was born at Montebello, California, on November 9, 1912; (2) that at the time of plaintiff's birth, his parents were natives and citizens of the United Mexican States; and (3) that some time in 1932 plaintiff took up residence in the United Mexican States and thereupon on April 1, 1943, entered on duty as a police officer of the police force of the Federal District of the United Mexican States and served in that capacity until some time in either 1945 or 1947:

(a) What is the applicable Mexican law concerning the question whether such employment in the police force of the Federal District of the

United Mexican States is employment under the Government of Mexico or a political subdivision thereof?

(b) Was plaintiff during the time of said employment deemed a Mexican national under the Mexican law concerning nationality?

(c) What are the rules of Mexican law, and any exceptions from or qualifications of these rules, concerning nationality as a requirement for plaintiff's employment in said police force?

(d) In particular, what are the rules referred to under (c), supra, in the case that plaintiff served in a special service of said police force? [44]

I have also examined a series of photostatic documents which are bound together and certified as being "a photostatic copy of Personal Record of Jesus Elizarraras Vazques as it appears in the Files of the Federal District of Mexico" by Alan E. Holl, Vice-Consul of the United States of America on the 18th of February, 1953, and found the English translations attached thereto to be substantially correct translations.

III.

I am answering these questions as follows:

Question (a):

Under the Political Constitution of the United Mexican States of 1917, Title II, Chapter II, entitled Of the integral parts of the Federation and the National Territory, Article 43, the Federal District is an integral part of the Mexican Federation.

Under the same Constitution, Title III, Chapter II, entitled Of the legislative power, Section III, entitled Of the powers of Congress, Article 73,

> Congress has the power
>
> *******
>
> VI. (as amended by decree published in the Mexican Official Gazette of December 15, 1934, To legislate in all matters relating to the Federal District and Territories, subject to the following rules: a. The government of the Federal District shall be in the charge of the President of the Republic who shall exercise it through the organ and organs which shall be determined by a law relating thereto.

Under the Organic Law for the Department of the Federal District in Execution of the First Subdivision of Fraction VI of Article 73 of the Consitution of December 31, 1941, Article 5,

> The President of the Republic shall have the Government of the Federal District in his charge and shall exercise it through a functionary who shall be called Chief of the District Department, subject to the rules of the present Law.

Under Article 23,

> The following are functions of the Department of the Federal District:
>
> *******
>
> (3) The direct organization and development in the Federal District of the services of police * * *

Under Article 35, [45]

> For the dispatch of the business of administrative nature of the Department of the Federal District and for the efficient attention to public services which are entrusted to it, there shall be the following general divisions:
> *******
> (13) The Chief Office of Police.

The Federal District of the United Mexican States is, therefore, a political subdivision of the United Mexican States and employment in its police force constitutes employment by a political subdivision of the United Mexican States.

Question (b):

This question is answered

(aa) by the Political Constitution of the Mexican States of 1917, Title I, Chapter II, entitled Of Mexicans, Article 30, as amended by decree published in the Mexican Official Gazette of January 18, 1934; this article has been translated in substantially correct manner by Miss America J. Thatcher in her Affidavit of March 5, 1953, with the exception that the second line of said translation should read in Article 30:

> "A. The following are Mexicans by birth."

and the tenth line thereof should read:

> "B. The following are Mexicans by naturalization:"

(bb) by the Mexican Law of Nationality and Naturalization of 1934, Chapter I, entitled Of Mexicans and of Aliens, Article 1:

> The following are Mexicans by birth:
>
> *******
>
> II. Those who are born in a foreign country of Mexican parents, of a Mexican father and alien mother, or of a Mexican mother and an unknown father.

Question (c):

This question is answered

(aa) by the above-mentioned Constitution, Title and Chapter, Article 32, first paragraph, as amended by decree published in the Mexican Official Gazette of December 15, 1934:

> Mexicans shall be preferred to aliens, if circumstances are equal, for any kind of concessions and for all kinds of Government employment, posts or commissions for which citizenship is not indispensable. In times of peace, no alien may serve in the Army or in the police or public security forces.

Under the same Title, Chapter IV. entitled Of Mexican citizens, Article 34, a [46] citizen is defined as a Mexican national who has completed 18 years and is married or 21 years and is not married and leads an honest way of life. Under the second sentence of Article 32, first paragraph supra, a non-

Mexican may not serve, inter alia, in the Mexican Army and police forces in time of peace. Under this sentence, laws were passed in Mexicao during World War II for the service of non-Mexicans in the Mexican Army, but no such law was passed and no such decree was issued providing for the service of non-Mexicans in the Mexican police forces. The rule mentioned below under (bb) that a police officer in the police force of the Mexican Federal District had to be a Mexican national by birth, was, therefore, not suspended on the basis of the Constitution, supra, Article 32, first paragraph, second sentence.

(bb) by the Regulations for the Preventive Police of the Federal District issued on November 12, 1941, by the Mexican President as a decree and published in the Mexican Official Gazette of December 4, 1941, which are still in force and effect except as to certain amendments which are immaterial to this inquiry, Book Two, Title I, Chapter II, entitled Requirements, Article 31, sub-section I:

> For membership in the Police it is required:
> I—To be a Mexican by birth.

Said Regulations do not contain any qualifications of or execeptions from this rule, nor has this Article been amended since.

However, this requirement of Mexican nationality by birth could have been waived in an individual case or specified classes of cases by Presidential decree. No such Presidential decree is known to me although I have made a search thereof. Such a de-

cree would be indexed in the Mexican Official Gazette only in bi-monthly and not-alphabetical indexes or, if published in the Official Gazette of the Federal District, not indexed at all.

(cc) by Article 77 of the same Regulations:

> The Chief of Police shall comply and shall cause compliance with the present regulations.

Question (d)

Under the above-mentioned Regulations for the Preventive Police of the Federal District of 1941, the police force is divided into several groups. Under Article 34, [47]

> The Line personnel consists of:
>
> I—Police on Foot.
> II—Language Police.
> III—Mounted Police.
> IV—Motorized Forces.
> V—Firemen Forces.

Under the Organic Regulation of Preventive Police of 1939 (Mexican Official Gazette of October 19, 1939), which was superseded by the Regulations of 1941, supra, Article 31, similar police groupings and a sixth grouping, called the Transit Police, were called "specialties." This term was not repeated in the 1941 Regulations, supra. The word "special" in connection with any sub-division of the police forces was used in the 1941 Regulations, supra, only in connection with the Special Admini-

strative Services of the police force in Articles 83, 84 and 145. Under Article 84, the Special Administrative Services have duties in connection with due process proceedings brought against the police. No special rule concerning nationality of police officers or employees is established in the 1941 Regulations, supra, concerning any of the police sub-divisions mentioned above or any other police sub-division.

/s/ WILLIAM B. STERN.

Subscribed and sworn to before me this 6th day of March, 1953.

[Seal] /s/ ELSIE POSSNER,
Notary Public in and for Said County and State.
My commission expires 5/21/56.

[Endorsed]: Filed March 9, 1953. [48]

[Title of District Court and Cause.]

FINDINGS OF FACT and CONCLUSIONS OF LAW

The above-entitled case having come on regularly for trial on the 6th day of March, 1953, and for further trial on March 9, 1953, in the above-entitled Court, before the Honorable Peirson M. Hall, Judge presiding, the plaintiff being present and represented by his attorney, John F. Sheffield, and the defendant being represented by his attorneys, Walter S. Binns, United States Attorney, Clyde C. Downing and Robert K. Grean, Assistants United

States Attorney, by Robert K. Grean; and the Court having heard statements of counsel and having received a stipulation of facts, and having received in evidence certified translations of Mexican law and a certified copy of the personnel record of the plaintiff as it appears in the files of the Federal District of Mexico, authenticated by the Vice Consul of the United States, with certified English translation attached thereto, and the Court having further received expert testimony by way of stipulated affidavit concerning Mexican law, and the matter having been further submitted on briefs filed after trial, and it appearing that Herbert Brownell, Jr., as Attorney General of the United States, has [50] been substituted as party defendant in the place of James T. McGranery, and the Court, having heretofore, on July 22, 1953, filed its Order for Judgment, hereby makes its Findings of Fact and Conclusions of Law.

Findings of Fact

I.

That Herbert Brownell, Jr., is the duly appointed qualified and acting Attorney General of the United States, and as such is the head of the Department of Justice and in such capacity is executive head of said Department of Justice.

II.

That the plaintiff, Jesus Elizarraras, was born in the City of Los Angeles, County of Los Angeles, State of California, on the 9th day of November,

1912, and claims permanent residence within such city, county and state, and within the Southern District of California, within which is located the above-entitled District Court of the United States.

III.

That the defendant is seeking to deprive the plaintiff of the right to remain and reside in the United States as a citizen thereof, on the ground that he is not a citizen of the United States.

IV.

That at the time of plaintiff's birth his parents were natives and citizens of the United States of Mexico, and that the plaintiff at said time had dual citizenship, viz: United States citizenship by birth in the United States; Mexican citizenship by virtue of the Mexican nationality of his parents.

V.

That plaintiff took up residence in the United States of Mexico in or about the year 1932, and thereafter, on April 1, 1943, entered on duty as a police officer of the police force of the Federal District of the United States of Mexico, and served in that capacity to March, 1947.

VI.

That the Federal District of the United Mexican States is a political subdivision of the United Mexican States, and employment in its police force [51] constitutes employment by a political subdivision of the United Mexican States, a foreign state within the meaning of Section 801(d) of Title 8, U.S.C.

VII.

That the employment accepted by the plaintiff in the police force of the Federal District of Mexico was employment for which only nationals of Mexico are eligible.

Conclusions of Law

I.

This Court has jurisdiction of the within matter under the provisions of Section 503 of the Nationality Act of 1940 (8 U.S.C. 903).

II.

That the plaintiff while a citizen of the United States by birth therein was also a citizen of Mexico at the time of his birth.

III.

That the plaintiff expatriated himself under the provisions of 8 U.S.C., 801(d), by accepting employment under the government of a foreign state or a political subdivision thereof, to wit, employment as a member of the police force of the Federal District of Mexico, from April, 1943, to March, 1947, employment for which only nationals of Mexico are eligible.

Wherefore, judgment should be against the plaintiff and for the defendant.

Dated this 11th day of August, 1953.

/s/ PEIRSON M. HALL,
United States District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed August 11, 1953. [52]

In the United States District Court, in and for the Southern District of California, Central Division

No. 14488—PH Civil

JESUS ELIZARRARAZ,

Plaintiff,

vs.

HERBERT BROWNELL, JR., in the Capacity of the Attorney General of the United States,

Defendant.

JUDGMENT

The above-entitled case having come on regularly for trial on the 6th day of March, 1953, and for further trial on March 9, 1953, in the above-entitled Court, before the Honorable Peirson M. Hall, Judge presiding, the plaintiff being present and represented by his attorney, John F. Sheffield, and the defendant being represented by his attorneys, Walter S. Binns, United States Attorney, Clyde C. Downing and Robert K. Grean, Assistants United States Attorney, by Robert K. Grean; and the Court having heard statements of counsel and having received a stipulation of facts, and having received in evidence certified translations of Mexican law and a certified copy of the personnel record of the plaintiff as it appears in the files of the Federal District of Mexico, authenticated by the Vice Consul of the United States, with certified English translation attached thereto, and the Court having further

received expert testimony by way of stipulated affidavit concerning Mexican law, and the matter having been further submitted on briefs filed after trial, and it appearing that Herbert Brownell, Jr., as Attorney General of the United States, has [54] been substituted as party defendant in the place of James T. McGranery, and the Court, having heretofore, on July 22, 1953, filed its Order for Judgment, and having heretofore made and filed its Findings of Fact and Conclusions of Law;

It is hereby ordered, adjudged and decreed:

1. That the plaintiff, Jesus Elizarraraz, is not a national of the United States, he having expatriated himself under the provisions of 8 U.S.C., 801 (d), by accepting employment and serving as a member of the police force of the Federal District of Mexico from April, 1943, to March, 1947, for which employment only nationals of Mexico are eligible;

2. That the defendant have judgment against the plaintiff; and

3. That the defendant recover his costs. Costs taxed at $42.00.

Dated this 11th day of August, 1953.

/s/ PEIRSON M. HALL,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 11, 1953.

Docketed and Entered August 11, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant Above Named and to His Attorney:

You Are Hereby Notified that the plaintiff above named hereby appeals to the Ninth Circuit of the Circuit Court of Appeals from that judgment and decree entered against him in the above-entitled proceeding.

/s/ JOHN F. SHEFFIELD,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 10, 1953. [57]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

To the Defendant Above Named and to His Attorney:

You Are Hereby Notified that the appellant intends to rely on the following points in the appeal filed by him on the above-entitled action:

1. That the court erred in decreeing judgment in favor of the defendant and against the plaintiff.

2. That the judgment in the above-entitled action is against the law and the evidence.

3. That the findings of fact and conclusions of law are not sustained by the evidence.

4. That the conclusions of law are not sustained by the findings of fact.

5. Errors committed by the court which prevented the plaintiff from having a fair and impartial trial.

Dated: Sept. 10, 1953.

/s/ JOHN F. SHEFFIELD,
Attorney for Plaintiff.

Endorsed]: Filed September 14, 1953.

In the United States District Court, Southern District of California, Central Division

Civil No. 14488—PH

JESUS ELIZARRARAZ,

Petitioner,

vs.

JAMES T. McGRANERY, etc.,

Respondent.

Honorable Peirson M. Hall, Judge Presiding.

REPORTER'S TRANSCRIPT OF CONFERENCE IN CHAMBERS

Los Angeles, California—March 9, 1953

Appearances:

For the Petitioner:

JOHN F. SHEFFIELD, ESQ.,
412 West Sixth Street,
Los Angeles 14, California.

For the Respondent:

WALTER S. BINNS,
United States Attorney,
Los Angeles 12, California, by

ROBERT K. GREAN,
Assistant United States Attorney.

(In chambers.)

The Court: Did you want to make a record on this matter?

Mr. Sheffield: I would like to make a record on it to this extent, that he knows that they were not citizens of Mexico because (1) he saw the birth certificate of one member of the police force——

Mr. Grean: That is immaterial to prove citizenship.

The Court: Let him finish.

Mr. Sheffield: And (2) that these persons declared that they were not citizens of Mexico to him.

The Court: Do you object to that on the ground that it is hearsay and immaterial?

Mr. Grean: I object on the ground it is hearsay and immaterial.

The Court: The offer of proof is rejected and the objection is sustained to it.

Mr. Sheffield: There is nothing in the record, and perhaps it is not important, but—

The Court: Just a moment, now. I can save you writing the letter.

See if I state the stipulation correctly:

It is further stipulated between the parties that if the plaintiff were called to the witness stand he would [2*] testify—what is it?

Mr. Sheffield: That he was asked his place of birth and he stated that he was born in Los Angeles.

The Court: And that at the time of his application to join the police force in Maxico City he was not asked the citizenship of his parents.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Sheffield: That is right.

Mr. Grean: So stipulated.

Mr. Sheffield: And he was only asked from where he had come, what part of Mexico he had come to when he came to the Federal District.

Mr. Grean: That he will so testify?

Mr. Sheffield: Yes.

The Court: And you will stipulate that he will so testify?

Mr. Grean: Yes.

The Court: And it is further stipulated that the parties may have 10 days within which to file simultaneous briefs and thereupon the matter will be submitted for decision.

Now you do not have to write any more letters, and that is it.

Mr. Sheffield: There is nothing in this affidavit of Mr. Stern covering this one point—and I have an expert witness who is prepared to testify as follows—that [3] Article 32 of the Constitution, as we have stipulated to, reads as it does, and that the regulations— —

Off the record.

(Here followed informal discussion outside the record.)

The Court: You will want that as a stipulation, that you have an expert by the name of Philip Newman who, if called, would testify—what?

Mr. Sheffield: That on June 1, 1942, there was a decree signed in Mexico by the President of the Republic suspending the guarantees——

The Court: The so-called civil liberties guarantees?

Mr. Sheffield: Yes, and a whole list of them—certain guarantees and certain articles of the constitution.

The Court: But that it did not specifically mention——

Mr. Sheffield: But made no reference to Article 32 and since the taking effect of the decree of June 1, 1942, there has never been any rule or regulation made modifying——

The Court: The previous regulations?

Mr. Sheffield: No, modifying Article 32, modifying a change in Article 32.

The Court: Or modifying the previous regulations with reference to Article 32?

Mr. Sheffield: That is right.

The Court: Will you stipulate to that?

Mr. Grean: I will stipulate to that as a [4] fact, that there were no regulations modifying Article 32 at any time since the promulgation of Article 32.

The Court: And that the president signed the decree suspending certain guarantees but did not specifically mention Article 32?

Mr. Grean: I don't know that the president signed such a decree, but I don't see that it is material so I will stipulate to that as a fact.

The Court: If you have a complete copy of the decree you can attach it to your brief and if you can stipulate I will take judicial notice of it.

Mr. Grean: All right.

The Court: Because you will have a chance to check it.

Mr. Grean: For this reason, I know Phil Newman, he is an attorney that we practiced against in this particular court and this district constantly, and I don't think he is any more qualified to state what the Mexican law is than Mr. Sheffield, whereas the qualifications of my expert are set forth. So for that reason I will stipulate that there has been no change, no amendment to Article 32, by decree or otherwise.

The Court: Will you agree that if he sets forth a copy of the decree that I may take judicial notice of it after you have had a chance to check it?

Mr. Grean: Yes, I will, your Honor.

Mr. Sheffield: You want that in English? [5]

The Court: Yes.

Mr. Grean: In fact, any law of Mexico that would contradict our contentions that counsel can find that he will set forth and I am able to check, I will stipulate to the introduction of them.

The Court: Very well.

Mr. Sheffield: I will be glad to submit those authorities.

The Court: Then why do you not do this, instead of 10 days simultaneous briefs, why not give you 10 days to file your opening brief?

Mr. Sheffield: I think the burden of proof has now shifted to the Government. They admit that the allegations of the complaint are true, and this is on the affirmative.

The Court: Then you can have 10 days to file

simultaneous briefs and 5 days to file replies, each of you.

Mr. Grean: That is satisfactory.

Mr. Sheffield: About this fellow Stern, counsel remarks that he doesn't know anything about the qualifications of Phil Newman. Stern, while he is a fine man and all, all he has are the books over in the library and he has no more.

Mr. Grean: You may raise any objections to the witness' sufficiency in your brief that you care to.

The Court: I can read foreign law too.

Mr. Grean: Will you stipulate to that, then? [6]

Mr. Sheffield: I didn't read this over. Did you read it over?

Mr. Grean: Yes. Take your time to read it, and here is a copy for your file. That is the one that we dictated together.

The Court: Give this to the clerk as the extra copy, then.

Very well.

(Whereupon, at 11:15 o'clock a.m., the conference was adjourned.)

[Endorsed]: Filed October 13, 1953. [7]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 60, inclusive, contain the orig-

inal Petition for Declaration of United States Nationality, etc.; Answer to Plaintiff's Complaint; Trial Stipulation; Order for Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal, Statement of Points on Appeal and Designation of Record on Appeal; which together with Reporter's Transcript of Proceedings on March 9, 1953, transmitted herewith constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the record on appeal come to the sum of $2.00, which has been paid to me by appellant.

Witness my hand and the seal of said District Court this 14th day of October, A.D. 1953.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14083. United States Court of Appeals for the Ninth Circuit. Jesus Elizarraraz, Appellant, vs. Herbert Brownell, Jr., as Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern Division of California, Central Division.

Filed October 15, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 14083.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS ELIZARRARAZ,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

JOHN F. SHEFFIELD, and
JACQUE BOYLE,
412 West Sixth Street,
Los Angeles 14, California,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS ELIZARRARAZ,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney' General of the United States,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Disclosing Jurisdiction.

Petition for Declaration of United States Nationality under Section 503 of the Nationality Act of 1940 (8 U. S. C. A. 903), was filed in the United States District Court, Southern District of California on September 8, 1952 [Tr. of R. p. 5].

The answer denied the material allegations of the Petition and raised the affirmative defense that appellant had been expatriated under Section 401(d) of the Nationality Act of 1940 [Tr. of R. p. 6].

Jurisdiction is conferred on the United States District Court from these premises and Title 28, U. S. C. A. 2201.

Judgment was entered in favor of the Appellee and against the appellant August 11, 1953 [Tr. of R. p. 45], and Notice of Appeal duly served and filed September 10, 1953.

Appeal from District Court to Circuit Court is permitted under 28 U. S. C. A. 1291.

Statement of the Case and Facts.

Appellant was born in the United States in 1912, of Mexican parents. In 1932, appellant went to Mexico with his parents and on April 1, 1943, during time Mexico was at War, joined the Police Force of Mexico City, attached to the Special Services Division. His service terminated in 1947; said service occurring *only* during the time that Mexico was at War.

The appellant returned to the United States in 1948.

The Immigration and Naturalization Service instituted deportation proceedings against appellant. This present action was instituted to establish the fact that appellant is a National of the United States.

The appellee pleaded the affirmative defense that the appellant had become expatriated under Section 401(d) of the Nationality Act of 1940 in that he had accepted employment in the Police Force of Mexico City, alleging that said employment was available only to Nationals of Mexico. To sustain this defense, the appellee cites the Mexican Constitution, Article 32, which provides that only Nationals of Mexico should be employed on the Police Force *in time of peace.*

No pledge of allegiance was ever made by appellant to the Republic or Country of Mexico.

The principal issue is whether or not the evidence justifies Finding VII and Conclusion III of the Findings of

Fact and Conclusions of Law [Tr. of R. p. 43]. More specifically, whether or not the appellant was expatriated for being employed by the Police Force of Mexico City during *War time.*

A further issue is presented, whether or not appellant expatriated himself by an involuntary act.

Specification of Error.

The trial court erred in holding that the evidence was sufficient to justify Finding VII of Findings of Fact and Conclusions of Law [Tr. of R. p. 43].

The Court erred in making Conclusion III of Conclusions of Law [Tr. of R. p. 43].

The Court erred in decreeing that the appellant had been expatriated under 401(d) Nationality Act of 1940, 8 U. S. C. 801(d) [Tr. of R. p. 45].

The Court erred in decreeing that a Native born National of the United States can be expatriated involuntarily.

Summary.

Appellant insists that he never, at any time, committed any act of expatriation. His service in the Mexico City Police Force during *War time* was not such as to require Mexican nationality.

Article 32 of the Mexican Constitution, urged by Appellees, restricts employment in the Police Force to Mexico Nationals in time of peace. There is no restriction cited anywhere providing for such a limitation in time of war.

Appellees have failed to prove that such employment was limited to nationals of Mexico, indeed, the record clearly shows, that the authorities in Mexico City had no knowledge of appellant's nationality other than that he was a national of the United States.

ARGUMENT OF THE CASE.

A. Appellant Is a Citizen of the United States by Reason of Birth in the United States.

1. The 14th Amendment to the Constitution of the United States provides that all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State in which they reside.

United States Constitution, 14th Amendment.

2. In the famous case of *United States v. Wong Kim Ark,* it was held that although the person born in the United States was of dual citizenship, he, nevertheless, was a citizen of the United States.

United States v. Wong Kim Ark, 169 U. S. 649.

B. Appellant Has Not Been Expatriated Under Section 401(d), Nationality Act of 1940 (8 U. S. C. 801(d)).

1. Expatriation results under this section when it is established that the United States citizen accepts employment under a foreign government that is available only to nationals of that government.

a. This section of the law provides as follows:

"A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

(d) Accepting, or performing the duties of, any office, post, or employment under the government of a foreign state or political subdivision thereof for which only nationals of such state are eligible."

Nationality Act of 1940, Sec. 401(d) (8 U. S. C. A. 801(d)).

b. This matter is an affirmative issue which must be proven by the party who urges the same.

The law provides that in proceedings to establish nationality under the Nationality Act of 1940, the burden of proof that the citizen has lost his citizenship or has been expatriated is upon the Government.

The fact must be established as an affirmative defense.

Schioler v. The Secretary of State, 175 F. 2d 402.

The burden of proof is on the Government to prove Loss of Citizenship.

Kawakita v. United States, 343 U. S. 717, 72 S. Ct. 950.

c. American citizenship is such an important right, that the proof to establish expatriation must be of an extremely high order.

Courts have passed on the question concerning the degree of proof necessary for expatriation, and without exception, it has been held that the evidence must be of a high caliber.

The evidence must be "clear, certain and overwhelming."

Nieto v. McGrath, 108 Fed. Supp. 150;

Martinez v. McGrath, 108 Fed. Supp. 155.

The Court stated in *Meyer v. United States* that citizenship shall not be cancelled unless the proof is "clear, certain and indeed overwhelming."

Meyer v. United States, 141 F. 2d 825.

Again, in the case of *Schneiderman v. United States,* the Court held that citizenship can only be revoked by evidence that is "clear, convincing and unequivocal."

> "It cannot be done by a bare preponderance, of evidence which leaves the issue in doubt. . . . Wigmore on Evidence, 3d ed., §2498—and more especially is this true when the rights are so precious!"
>
> *Schneiderman v. United States,* 320 U. S. 118, 63 S. Ct. 1333.

A somewhat similar situation to that which exists in the instant case, was presented in the matter of *Naito v. Acheson* and in *Furuno v. Acheson.* These were American citizens by birth of Japanese parents. Naito was employed in a clerical capacity in the United States Army Supply Depot and later transferred to civilian control under Japanese Government. In effecting this change, it was ordered that such civilian employees would have to be citizens of Japan. The Court held that the evidence was insufficient to result in expatriation and stated as follows:

> "The evidence presented by the defendant (Secretary of State of United States) does not even remotely rise to the level of the exacting *standard of proof* required to deprive a person of citizenship. As the Supreme Court has stated: 'Proof to bring about a loss of citizenship must be clear and unequivocal.' Baumgartner v. U. S., 322 U. S. 665, and Schneiderman v. U. S., 320 U. S. 118."
>
> *Naito v. Acheson,* 106 Fed. Supp. 770.

The companion case involved a native American of Japanese parents who was employed as a mate on a Japanese Ferryboat when an order was signed that his classification called for Japanese nationals to fill such employ-

ment. The Court affirmed the case of *Naito v. Acheson, supra.*

Furuno v. Acheson, 106 Fed. Supp. 775.

The Court's attention is called to the case of *Acheson v. Maenza* which appellant believes is very similar to the instant case. The plaintiff was an American born citizen of Italian parents. He returned to Italy and was conscripted into the Italian Army. The question arose as to whether or not the plaintiff had taken an oath of allegiance. The regulations which the Government relied upon in that case were about as vague and indefinite concerning the Army and the Oath of Allegiance, as were the orders in the instant case concerning the limitations on the employment of police officers in Mexico City during war time.

The Court said:

> "American citizenship is perhaps the most precious right known to man today; it is not easily granted nor should it be lightly taken away. In denaturalization cases, the government has always been held to a strict degree of proof; it is usually required to prove its case by *clear, unequivocal* and convincing evidence, not by a base preponderance which leaves the issue in doubt."
>
> *Knauer v. United States,* 328 U. S. 654, 66 S. Ct. 1304, 90 L. Ed. 1500;
>
> *Baumgartner v. United States,* 322 U. S. 665, 64 S. Ct. 1240, 88 L. Ed. 1525;
>
> *Schneiderman v. United States,* 320 U. S. 118, 63 S. Ct. 1333, 87 L. Ed. 1796.
>
> ". . . In this case the government introduced the 1872 Military Regulations of the Italian Army to show that an oath must have been taken by the

plaintiff . . . This did not cure the fatal weakness in the government's case but merely added an element of conjecture and speculation to a field where proof is required. No substantial evidence was forthcoming that the regulations were still in effect when appellee complied with them even if they were still applicable. There must be more than inference, hypothesis or surmise before a natural-born citizen of the United States can be stripped of his rights and privileges of citizenship and be adjudicated an expatriate."

Acheson v. Maenza, 202 F. 2d 453.

C. Citizens and Nationals of the United States by Birth Cannot Be Expatriated Except Voluntarily.

In the early case of *United States v. Wong Kim Ark,* the Court said:

"The 14th Amendment, while it leaves the power where it was before, in Congress to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."

United States v. Wong Kim Ark, supra.

In the later case of *Perkins v. Elg,* the Court considered a matter involving a native born American of dual citizenship and stated that such citizenship could not be lost except by voluntary renunciation.

". . . persons born within the United States and subject to its jurisdiction become citizens of the United States. To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action."

Perkins v. Elg, 307 U. S. 325.

D. Appellee Failed to Produce Evidence of the High Standard Required to Justify the Finding of Fact VII, the Conclusions of Law III, and the Judgment of Expatriation.

1. These Findings and Conclusions are subject to review on appeal. This Circuit Court has the right to review the same.

Baumgartner v. United States, 322 U. S. 665, 64 S. Ct. 1240.

2. The only evidence to sustain the Judgment of expatriation was a dubious inference that the law of Mexico which prevailed in peace time was continued over into war time without any specific reference to a fact or regulation so providing [Tr. of R. p. 38]. We submit that the wording of Section 32 of the Mexican Constitution relied upon by Appellees *restricts* the nationality requirement for service in the Mexican Police Force to *times of peace.*

3. The burden of proof is on the appellee to prove this issue.

Schioler v. Secretary of State (*supra*).

4. This proof must be clear, unequivocal, convincing and overwhelming.

5. The evidence established that the appellant was employed on the Police Force of Mexico City during war time [Tr. of R. pp. 9-10]. The Mexican Constitution and law provided that *"during time of peace"* only nationals of Mexico were employable as Police Officers. Article 32, Mexican Constitution [Tr. of R. p. 13]. All of the regulations promulgated thereunder and referred to in the Exhibits and Stipulations were made at a time when Mexico was at peace [Tr. of R. p. 15]. By Stipula-

tion, it was agreed that Mexico declared war on May 22, 1942 [Tr. of R. p. 10], and the regulations introduced by appellee were dated November 12, 1941, or earlier [Tr. of R. p. 15].

6. The facts indicate a strong inference that the Mexican Government made no requirement of nationality as a prerequisite to employment on this Police Force in Mexico City during a time of war [Tr. of R. p. 38]. The appellant was attached to the "Special Services" Department of the Police Force and appellee's witness, William S. Stern, testified that, even in time of peace, the requirement of Mexican Nationality could have been waived [Tr. of R. p. 38]. He also testified that he does not know if it was waived or not [Tr. of R. p. 39]. In his application for the position, the appellant listed his place of birth as Los Angeles, California, thus establishing the fact that he was a national of the United States [Tr. of R. p. 20]. In none of the documents on file with the Mexico City Police Force is there any reference to the fact that the appellant is a national of Mexico [Tr. of R. pp. 20-31]. The nationality of appellant's parents was never disclosed to the Mexican authorities, nor did the appellant ever take an Oath of Allegiance to the Mexican Government [Tr. of R. p. 49]. If Mexican Nationality was an indispensable prerequisite to employment on the Mexico City Police Force, where is the evidence that appellant's Mexican Nationality was made known to the authorities at the time of his employment on said Police Force. Appellant knows of no law nor regulation limiting employment in the Mexico City Police Force to Nationals of Mexico in *time of war,* and no law nor regulation to such effect was introduced in evidence.

In brief, the Appellee had the burden to prove that appellant was expatriated because he accepted employment in the Mexico City Police Force which employment was available only to Nationals of Mexico.

The proof failed. The employment was so limited in time of peace. Appellant's employment occurred in time of war and no evidence was introduced by Appellee establishing that such employment was limited to Nationals in time of war. Indeed, it must be inferred that if the law of Mexico *limited* such employment in time of peace, by using words of limitations, the opposite would be true in time of war, permitting employment in the police force in time of War to anyone *without limitation* who would assist in the defense of the Patria—Mexico.

It is respectfully requested that the decree and judgment of the District Court be reversed, and that this Court decree that Appellant is a citizen of the United States and has not been expatriated.

Respectfully submitted,

John F. Sheffield, and
Jacque Boyle,
Attorneys for Appellant.

No. 14083

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS ELIZARRARAZ,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT K. GREAN,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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IN THE

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JESUS ELIZARRARAZ,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court had jurisdiction of the action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) [Tr. 41-42, 43].

Judgment for the defendant was entered August 11, 1953 [Tr. 44-45], and the jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C., Section 1291.

Statement of Facts.

Appellant was born in the United States in 1912. At the time of his birth, his parents were natives and citizens of Mexico, and appellant acquired Mexican citizenship by birth by virtue of the Mexican nationality of his parents [Tr. 42]. Sometime in 1932, appellant took up residence in Mexico and thereafter, on April 1, 1943, entered on duty as a police officer of the Police Force of the Federal District of Mexico and served in that capacity until 1947 [Tr. 9].

The Attorney General of the United States, through the Immigration and Naturalization Service, sought to deny the appellant the right to remain and reside in the United States as a citizen thereof on the ground that he expatriated himself under Section 401(d) of the Nationality Act of 1940 by accepting or performing the duties of a police officer of the Federal District of Mexico, to-wit: employment under the Government of a foreign state or a political subdivision thereof for which only nationals of Mexico are eligible [Tr. 42].

Appellant sought a declaration of nationality from the Court below [Tr. 3] to establish his right to remain in the United States as a citizen thereof. The Court below ruled that appellant had expatriated himself and granted judgment for the appellee. Whereupon, appellant filed this appeal.

Statutes Involved.

Section 401(d) of the Nationality Act of 1940 (8 U. S. C. A. 801(d)) provided in pertinent part as follows:

> "§801. General Means of Losing United States Nationality.
>
> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * * * * *
>
> (d) accepting, or performing the duties of, any office, post, or employment under the Government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; * * *"

Section 402 of the Nationality Act of 1940 (8 U. S. C. A. 802) provided in pertinent part as follows:

> "§802. Presumption of Expatriation.
>
> A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection * * * (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. * * *"

The Mexican law involved herein will be treated in the Argument to follow.

ARGUMENT.

This is not a case involving a claim of duress or a claim on behalf of the appellant that his employment under the Government of Mexico was involuntary. Appellant admits that on or about April 1, 1943, he entered on duty as a police officer of the Police Force of the Federal District of Mexico and served in that capacity until 1947.

Appellant claims rather that his employment was not, under Mexican law, employment for which only nationals of Mexico were eligible.

Thus, the only question presented is one of the requirements of Mexican law pertaining to appellant's employment on the Police Force and may be stated thusly:— Was appellant's employment that for which only nationals of Mexico were eligible?

I.

Appellant Was a Citizen of Mexico by Birth.

While appellant was born in the United States and thereby acquired United States citizenship, he was also a citizen of Mexico by birth under the "Political Constitution of the United States of Mexico," Title I, Chapter II, Article 30A. The translation of the Mexican Constitution was introduced, into evidence as an exhibit by Stipulation [Tr. 10] and it was further stipulated that said exhibit was a true and correct copy of said Mexican law [Tr. 10].

The law states:

"A. The following are Mexican by birth:

I. Individuals born within the territorial limits of the Republic, irrespective of the nationality of their parents.

II. Individuals born in foreign countries of Mexican parents; * * *."

Thus, it must be conceded that if only Mexican nationals were eligible for appellant's employment on the Mexican Police Force, he had such nationality according to Mexican law, "by birth," under A-II above.

II.

Only Mexican Citizens by Birth Could Serve in the Police Force of Mexico.

Article 32 of the "Political Constitution of the United States of Mexico" above referred to, covered by the same Stipulations of counsel as to its admittance in evidence and its correctness states in part:

> "* * * No alien may serve in the Army, nor in the Police Corps, nor in any other department of public safety during times of peace" [Tr. 13, 37].

Upon this language, appellant bases his entire defense. His contention is that since his service in the Mexico City Police Force was during "wartime," he was not required to have Mexican nationality to secure his employment. This reasoning is specious for two reasons.

First, the testimony in the court below of appellee's expert witness, William B. Stern, admitted by way of

his Affidavit by Stipulation [Tr. 10-11] is as follows [Tr. 37-38]:

> "Under the second sentence of Article 32, first paragraph *supra,* a non-Mexican may not serve, *inter alia,* in the Mexican Army and Police Forces in time of peace. Under this sentence, laws were passed in Mexico during World War II for the service of non-Mexicans in the Mexican Army, but no such law was passed and no such decree was issued providing for the service of non-Mexicans in the Mexican Police Forces. The rule mentioned below under (bb) that a Police Officer in the Police Force of the Mexican Federal District had to be a Mexican national by birth, was, therefore, not suspended on the basis of the Constitution, *supra,* Article 32, first paragraph, second sentence."

The interpretation is simple. A constitutional provision passed in time of peace, pertaining to peace, continues through time of war, unless altered by the passage of a subsequent law.

Second, "Regulations of the Preventive Police of the Federal District" certified as true and correct by the Vice Consul of the United States of America, admitted into evidence by Stipulation [Tr. 10] and set out at page 17 of the transcript of record, issued on November 12, 1941, by the Mexican President as a decree and published in the Mexican Official Gazette of December 4, 1941, which are still in force and effect except as to certain amendments which are immaterial to this inquiry, provide

as follows in Book 2, Title I, Chapter II, entitled Requirements, Article 31, subsection 1:

> "The requirements for membership in the Police Force are as follows:
>
> I. The applicant must be a Mexican citizen by birth. * * *"

Said regulations do not contain any qualifications of or exceptions from this Rule, nor has this article been amended since.

Thus, in addition to official excerpts, duly authenticated, of Mexican law upon which the appellee relies, there is the testimony of appellee's expert witness William B. Stern supporting their interpretation and all strengthening the inescapable conclusion that appellant's employment was employment under the Government of Mexico for which only nationals of Mexico were eligible.

III.

Supporting Evidence and Presumptions.

Appellant alleges that there is no evidence that appellant's Mexican nationality was made known to the authorities at the time of his employment. However, his personnel record [Tr. 21-22] lists him as a native of "Penjamo, Gto. Son of: Pascual Elizarraras, and of Conrada Vazquez."

Appellant further alleges that he was attached to the "Special Services" Department of the Police Force. However, in his personnel record [Tr. 22] there are no entries under "Special Services." It is appellee's contention that

the words "Special Services" thereon merely indicated a place where any special services could be listed. None are listed, and lacking any evidence to the contrary, it must be presumed that appellant engaged in none. In fact, his personnel record [Tr. 20-31] shows him to have been an ordinary police officer.

The acts upon which Section 801 expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. When an American citizen has performed one of the enumerated overt acts, he has expatriated himself.

Savorgnan v. United States, 338 U. S. 491.

The overt acts must be voluntarily done.

Dos Reis ex rel. Camara v. Nicols (5th Cir.), 161 F. 2d 860.

Here, there is no defense of duress. Appellant voluntarily joined the Police Force. He served from 1943 to 1947 in the stated employment and Section 402 of the Nationality Act of 1940 (8 U. S. C. A. 802), raises a presumption of expatriation which the appellant had the burden of overcoming. This he has failed to do.

At a time when others with dual nationality were registering for military service with the United States and indicating their allegiance to the country of their birth, appellant chose to remain in Mexico and to seek employment there under the Mexican Government. That employment as a Police Officer in the Federal District of Mexico is employment under the Government of a foreign

state or a political subdivision thereof within the meaning of 401(d) of the Nationality Act of 1940 (8 U. S. C. A. 801(d)), is not disputed. It is supported by expert testimony [Tr. 34-36].

Conclusion.

Thus, to summarize, we have the following situation:

1. Appellant had dual citizenship at birth, to-wit: both Mexican and United States nationality.

2. Voluntary employment in the Police Force of the Federal District of Mexico, a foreign state, or political subdivision thereof within the meaning and intent of Section 401(d) of the Nationality Act of 1940 (8 U. S. C. A. 801(d)).

3. Mexican law submitted in proper translation with expert testimony as to the effect thereof that only citizens of Mexico by birth are eligible for such employment.

4. The presumption of expatriation raised by extended residence in Mexico under Section 402 of the Nationality Act of 1940 (8 U. S. C. A. 802).

Appellant's sole defense is that the Mexican Constitution required citizenship, by birth "in time of peace" and thus had no application as a requirement to employment in time of war. This is a mere contention of the appellant, unsupported by any evidence whatsoever, and flatly contradicted by the police regulations and the expert testimony offered by the appellee. The direct requirement of the police regulations in effect at all times herein men-

tioned was "for membership in the police, it is required: I. To be a Mexican by birth." Said regulations do not contain any qualifications of or exceptions from this rule, and the Mexican law on its face and as interpreted by appellee's expert witness required Mexican nationality as a prerequisite to appellant's employment. It was employment for which *only* nationals of Mexico were eligible.

Wherefore appellee respectfully prays that the judgment of the District Court be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

ROBERT K. GREAN,
Assistant U. S. Attorney,

Attorneys for Appellee.